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EFFECT OF FOREIGN ANTITRUST LAWS
ON UNITED STATES BUSINESS[†]*by**E. Ernest Goldstein**

I. INTRODUCTION

IN 1938, it could have been said that an American businessman operating outside of the North American area was generally free to do everything that he was not free to do under the Sherman¹ and Clayton Acts² back home. In only a few countries, such as Norway,³ he might have to register some of his restrictive agreements, but he could be assured that, in general, such registration would not be a real hindrance.⁴

The picture now has changed. The change is not a complete one, but it is real and gives every indication of continuing. It is not suggested that the Sherman and Clayton Acts have been incorporated into the legal systems of our friends, but something has happened which should put every American with a foreign affiliate, subsidiary, or licensing agreement on his guard.⁵

II. UNITED STATES RESPONSIBILITY FOR FOREIGN LEGISLATION

Although this new trend toward control of restrictive business practices and cartels does represent a response to public demands

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¹ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

² 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1952).

³ Law of March 12, 1926, On the Control of Restrictions on Competition and Unreasonable Prices, as amended, June 30, 1932, and June 24, 1938; see notes 27 and 28 *infra*.

⁴ Boycotts were considered legal in the cigarette industry, Trustkontrollen, No. 12, 1928, and in the textile industry, Trustkontrollen, No. 38, 1932. See article entitled "Business Disputes," *Aftenposten* (Oslo), June 25, 1953, which says in part: "It looks as though the Price Directorate simply has filed the reports on restrictive agreements which have been received through the years." See also editorial entitled "Price Act and Competition," *Arbeiderbladet* (Oslo), Sept. 30, 1953.

⁵ Even Switzerland, long considered the bulwark of cartellism, seems to desire some form of control. A control proposition was rejected by the voters in January 1958, because of the form of the proposition and not because of its purpose. *Foreign Commerce Weekly*, Vol. 59, No. 13, March 31, 1958, p. 3.

in the free world, it is well to recognize that the official policy of our Government has been very instrumental in creating the new climate. An understanding of the role played by our Government would seem helpful in evaluating the impact and probable direction of this new movement toward control of restrictive practices, as well as our government's attitude if called upon to assist American enterprises operating abroad.

In part, our efforts represent a sort of self-defense. Cartels are often able to subsidize export programs which directly affect our domestic economy and our own export program. Wisely or not, we have enacted a variety of legislation to provide a hoped-for protection against such an infection of our economy.⁶ This legislation served to notify the rest of the world that we were not willing to let our competitive system deteriorate under the impact of the growing trend elsewhere toward cartellism. The shift from a laissez-faire system to a privately regulated economy was for the most part a product of the instability that followed World War I.⁷ The same forces which eventually impelled us to experiment with the National Recovery Act⁸ had effectively changed the form of business conduct in other parts of the world beginning with the depressions and inflations of the 1920's. Our legislation did little more than serve notice of our thinking.

As our entry into World War II approached, we discovered that much of our defense effort was hamstrung by cartel activities. Several congressional committees, notably the Bone Committee,⁹ the T. N. E. C.,¹⁰ and the various committees concerned with military preparedness¹¹ uncovered specific evidence of the price we were paying for the affiliation of American business with foreign cartels. The executive branch of our Government played its role in bringing further evidence to the fore through the antitrust litigation

⁶ Wilson Tariff Act, 28 Stat. 570 (1894), as amended, 15 U.S.C. §§ 8-11 (1952); Antidumping Provisions Revenue Act of 1916, 39 Stat. 798, 15 U.S.C. §§ 71-76 (1952); Unfair Import Practices Tariff Act of 1930, 46 Stat. 703, 19 U.S.C. § 1937 (1952); Webb-Pomerene Export Trade Act, 40 Stat. 516 (1918), 15 U.S.C. §§ 61-65 (1952); and others.

⁷ Stocking and Watkins, *Cartels or Competition?* 32-67 (1948).

⁸ 48 Stat. 195 (1933), as amended, 49 Stat. 375, 15 U.S.C. §§ 701-12 (1952).

⁹ Hearings on S. 2303 and S. 2491 Before the Senate Committee on Patents, 77th Cong. (1942). See, e.g., pts. 5, 7.

¹⁰ Temporary National Economic Committee; see Gilbert & Dickens, *Export Prices and Export Cartels* (TNEC Monograph No. 6, 1940); Domeratsky, Callman, Roman, Cover, and Miller, *Regulation of Economic Activities in Foreign Countries* (TNEC Monograph No. 40, 1941).

¹¹ Hearings on S. 2721 Before a Subcommittee of the Senate Committee on Military Affairs (on technological mobilization), 77th Cong. (1942), see, e.g., pt. 11; Hearings Before a Special Senate Committee Pursuant to S. Res. 71 (Investigation of the national defense program), 77th Cong. (1942), see especially pt. 11.

which involved overseas restrictive business activities affecting our foreign commerce.¹²

Out of this welter of material emerged a policy which began to be consistently expressed at the close of the war. In chapter five of the Havana Charter¹³ is found a clear statement of views which have not failed to impress responsible leaders in other countries,¹⁴ despite the fact that the Charter never became a living instrument. The post-war series of Treaties of Friendship, Commerce, and Navigation spell out a bilateral policy on restrictive practices.¹⁵ The bilateral agreements with participating countries in the Marshall Plan made clear our determination that the recovery program was not to be frustrated by restrictive business practices.¹⁶ At the same time, the Congress continued to express its concern by investigating further

¹² See cases discussed in Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 65-91, March 31, 1955.

¹³ U.S. Dep't of State Pub. No. 3206, Havana Charter for an International Trade Organization, pp. 86-92 (1948).

¹⁴ See unpublished manuscript by Wilhelm Thagaard, Director of the Norwegian Price Directorate, International Conference on Restrictive Business Practices, Chicago, Jan. 15, 1958, p. 17.

¹⁵ E.g., in Treaty with Israel, Aug. 23, 1951, 5 U.S.T. & O.I.A. 785, T.I.A.S. No. 2948; Treaty with Greece, Aug. 3, 1951, 5 U.S.T. & O.I.A. 1829, T.I.A.S. No. 3057; Treaty with Ireland, Jan. 21, 1950, 1 U.S.T. & O.I.A. 785, T.I.A.S. No. 2155; Treaty with Italy, Feb. 2, 1948, 63 Stat. B2255, T.I.A.S. No. 1965, appears some version of the following text:

The two parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each party agrees upon the request of the other party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

¹⁶ E.g., see Treaty of Economic Cooperation with the United Kingdom, July 6, 1948, art. II, para. 3, 62 Stat. 2596, T.I.A.S. No. 1795, which reads as follows:

The Government of the United Kingdom will take the measures which it deems appropriate, and will co-operate with other participating countries, to prevent, on the part of private or public commercial enterprises, business practices or business arrangements affecting international trade which restrain competition, limit access to markets or foster monopolistic control whenever such practices or arrangements have the effect of interfering with the achievement of the joint programme of European recovery.

See also 62 Stat. 2607 (1948) (Annex—Interpretative Notes) as follows:

3. It is understood that the business practices and business arrangements referred to in paragraph 3 of Article II means—

- (a) Fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
- (b) Excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
- (c) Discriminating against particular enterprises;
- (d) Limiting production or fixing production quotas;
- (e) Preventing by agreement the development or application of technology or invention whether patented or unpatented;
- (f) Extending the use of rights under patents, trade marks or copyrights granted by either country to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants; and
- (g) Such other practices as the two Governments may agree to include.

into cartel problems,¹⁷ and finally, specific legislation designed to discourage restrictive business practices and to encourage free competition in the countries benefiting from foreign aid was enacted.¹⁸ This legislation which led to the creation of the European Productivity Agency as an organ of the Organization for European Economic Cooperation and which brought into being the Productivity programs in Western Europe has probably been the most direct influence leading to new legislation designed to curb anti-competitive activities. Of course, other influences have also been at work, such as the occupations of Germany and Japan which have set a pattern.¹⁹

Through the Productivity programs has come the educational basis for popular support of legislation designed to curb private regimentation of the economy. The education has been direct in the form of demonstrated benefits to consumers, labor, and management where experimentation with competitive production and pricing has been permitted.²⁰ Further, study missions to the United States have

¹⁷ See Department of State, Select Senate Committee on Small Business, 82d Cong., 2d Sess., Foreign Legislation Concerning Monopoly and Cartel Practices (Subcomm. Print No. 5, 1952); *id.*, Hearings on Monopoly and Cartels (Subcomm. Print 1952).

¹⁸ Section 516(a) of the Mutual Security Act of 1951, 67 Stat. 152, 22 U.S.C. § 1667 (1952), reads as follows:

It is declared to be the policy of the Congress that this Act shall be administered in such a way as (1) to eliminate the barriers to, and provide the incentives for, a steadily increased participation of free private enterprise in developing the resources of foreign countries consistent with the policies of this Act, (2) to the extent that it is feasible and does not interfere with the achievement of the purposes set forth in this Act, to discourage the cartel and monopolistic business practices prevailing in certain countries receiving aid under this Act which result in restricting production and increasing prices, and to encourage where suitable competition and productivity, and (3) to encourage where suitable the development and strengthening of the free labor union movements as the collective bargaining agencies of labor within such countries.

Section 9(c) of the Mutual Security Act of 1952, 66 Stat. 141, 22 U.S.C. § 1513 (1952), amending § 115 of the Economic Cooperation Act of 1948, 62 Stat. 137, as amended, 22 U.S.C. § 1933 (1952), reads as follows:

(1) \$100,000,000 shall, to the maximum extent practicable consistent with the accomplishment of the policies and purposes of the Mutual Securities Act of 1951, as amended, be expended in such manner and subject to such agreements as may be necessary to assure that the amounts of local currencies deposited under subsection (b)(6) as a result of such expenditure shall be used exclusively, in accordance with principles developed by the Administrator, to establish revolving funds which shall be available for making loans, and otherwise to carry out programs in furtherance of the objectives of section 516 of the Mutual Security Act of 1951, with a view to stimulating free enterprise and the expansion of the economies of those countries with equitable sharing of the benefits of increased production and productivity between consumers, workers, and owners; and (2) the Director for Mutual Security is authorized to transfer not exceeding \$2,500,000 to the Organization for European Economic Cooperation, to be used on terms and conditions to be specified by the Director in order to promote the objectives of Section 516 of the Mutual Security Act of 1951, as amended.

¹⁹ E.g., Law on Prohibition of Excessive Concentration of German Economic Power, Law No. 56, Jan. 28, 1947, Military Government Gazette, Germany, Issue C, April 1, 1947; and Control of Restrictive Trade Practices in Japan, Restrictive Trade Practices Specialists Study Team, Japan Productivity Center, Tokyo, 1958, p. 3.

²⁰ E.g., Commissariat General a la Productivite, Objectifs et Realisations, pp. 76-84 (Paris) (1956).

taken back to Europe and Asia converts to our notions of competition.²¹

Against this background of official policy, one must measure the actual conduct of some American enterprises abroad. As will be seen, some American firms have attempted to be the noblest Romans operating in Rome. Some few firms have, by their conduct, cast some doubt on the true intentions of the American Government and unwittingly provided fuel for the Communist propaganda machines.²² This has undoubtedly slowed the trend toward regulation of restrictive practices in some areas, but the trend exists nonetheless. Another factor militating against the full and early success of American efforts to convince our friends of the need for competition is found in our import policy. Voluntary textile import limitations have led to the re-establishment of export cartels in Japan,²³ agricultural limitations have had similar results elsewhere,²⁴ and the general feeling in some foreign quarters is that only through the technique of an export cartel can there be compliance with our requests for voluntary reduction of shipments to our shores. These facts must be considered if we wish fairly to evaluate the efforts made to control restrictive practices abroad. It is well to remind ourselves of the dismal early years of the Sherman Act when hardly a case was brought,²⁵ and contrast this with the surprising amount of energy displayed in a short time abroad, which will be discussed later in this Article.

²¹ Department of Commerce, Report of a Visit to the United States of a British Specialist Team on Industrial Engineering (1954), wherein it is stated:

One of the three factors of over-riding importance causing the United States to lead the world in national wealth and productivity is the sharp and urgent competitiveness of the U.S. economy. It is our opinion that, more than any other factor, competition provides the drive for the more frequent analysis of costs and the application of industrial engineering techniques in the United States, and the constant effort to achieve the most economic usage of man, materials, machines and money.

Monopolies legislation in Britain should be considerably strengthened and its range extended to ensure competitive conditions. As a first step, we recommend Parliament to consider enforcing by law that trade and industrial associations (and trades unions), where they do not already do so, should publish any rules or agreements which bind their members. This, in our opinion, is essential to attain greater efficiency and reduction of costs.

²² E.g., *Economie et Politique, Revue Marxiste d'Economie, La France et les Trusts*, Nos. 5, 6 (Paris) (1954).

²³ Export Trading Law No. 299, Aug. 5, 1952, found in *Laws and Regulations Concerning Foreign Exchange and Foreign Trade*, Ministry of Foreign Affairs (Tokyo) (1952). This is similar to Webb-Pomerene and legalizes export cartels under certain conditions. Law 188, 1953, amends the 1952 law, but does not affect the proposition for which it is cited; see also article entitled "Japanese to Curb Textiles Export," *N.Y. Times*, Aug. 16, 1955.

²⁴ E.g., see article entitled "U.S. Trade Policy in Italy Aids Reds," *N.Y. Times*, Oct. 3, 1954, p. 9, col. 1.

²⁵ Thorell, *The Federal Antitrust Policy* 369-500 (Stockholm) (1954).

III. GENERAL OBSERVATIONS

Foreign legislation is of four types. The most common legislation makes it obligatory upon parties to restrictive arrangements to register their arrangements with an administrative body. Dominant firms must also, in many cases, register. No agreement or activity is enforceable if not registered. The fact that the legislation, in one way or another, represents the idea that there can be good restrictive practices and good cartels makes the enforcement of the registration procedures fairly simple. The second legislative approach is on an enquiry basis. This legislation usually sets up a commission to investigate on its own initiative, or upon complaint, certain types of practices or industry patterns of restriction. The commission may then pass on the arrangements and invoke the aid of the courts in terminating certain practices. In some cases the commission may establish fair-trading rules for the industry similar to the trade practice activities of our Federal Trade Commission. In some countries features of this type of legislation are combined with other types. The third form of legislation is that directed against a single practice or a group of related practices which are made illegal subject to certain exemptions. The fourth legislative approach is usually limited to the international sphere. It calls for the suppression of anti-competitive activities in somewhat general language that might at first blush evoke a comparison with the Sherman Act.

Several further generalizations might be noted before proceeding to an analysis of specific prototype legislation and its enforcement. In practically every country the administrative agencies created by the restrictive business practices legislation have broad powers. These powers may include the right to negotiate the equivalent of consent decrees without judicial or public scrutiny, the right to confiscate profits, and the right to enjoin activities. In all but the few common-law countries, the absence of a doctrine of stare decisis may mean repetitious appellate or private litigation. This in turn enhances the already broad powers of the administrative agencies, so that for most purposes the administrative agency is judge, jury, and policeman as well as prosecutor. Finally, one may consider the extent to which the legislation in question, as a reaction to the rigidity of the private anti-competitive system, implies greater governmental control of business than even the severest critics of our antitrust laws claim in this country.

In the space allotted it would be impossible to give a detailed analysis of the provisions of the more than twenty foreign legislative sit-

uations of primary interest. Therefore, attention will be devoted to four prime examples of different types of legislation: the Norwegian, Irish, French, and the European Coal and Steel Community and Common Market. After a discussion of the provisions and development of these systems, some attention will be given to high spots of other legislative systems, and then, the case and administrative law developments under the various systems. Norway, as the oldest continuing compulsory registration system, provides the clearest picture of the evolutionary process involved in legislation. The Irish Free State has a different approach which is of significance because of its newness and the major effort being made to induce American investment and production in that country. France represents an entirely new approach to restrictive practices and is significant because of the surprising results thus far. Finally, the Coal and Steel Community and the Common Market Treaties represent an international approach of potential significance to American investors and licensors.

IV. REPRESENTATIVE FOREIGN LEGISLATION

A. Norway

Norway may boast of the longest history of legislation in the cartel field outside of North America. In 1920, as an amendment to a wartime price control law, Norway enacted legislation designed to control, as distinguished from prohibitory legislation, restrictive business practices, cartels, and monopolies.²⁶ This early legislation provided for compulsory registration of restrictive associations, agreements, and what are termed dominant enterprises. Control and supervision of cartels was afforded by registration, and intervention in cartel affairs was through price control.

Permanent legislation, known as the Trust Control Act, was enacted in 1926,²⁷ and with some amendments²⁸ it was the law until June 26, 1953,²⁹ when the present law came into being. The 1953 legislation has since been amplified and amended.³⁰ All of these acts,

²⁶ See discussion of Law of Aug. 6, 1920, Notes et Etudes Documentaires, No. 1.622 (Paris), June 7, 1952, p. 10.

²⁷ See Report of the Ministry of Finance, The Price Act, Enclosure No. 1 to Oslo, Dispatch No. 786, June 3, 1954, p. 71.

²⁸ Ibid. The amendments were Law of June 30, 1932, No. 2, and Law of June 24, 1938, No. 23.

²⁹ For an English language text, see U.N. EcoSoc Council Off. Rec. 19th Sess., Supp. No. 3, at 61-73 (E/2671) (1954).

³⁰ See Thagaard, *op. cit. supra* note 14, at 8-9, 11-12, discussing the Royal Decree of March 1956, prohibiting price and profit increases without Price Directorate approval, and also discussing the Royal Decree of Oct. 18, 1957, prohibiting resale price maintenance without Price Directorate approval.

as is usually the case, exempt trade unions from their operation, but professional associations of doctors and lawyers do come under the terms of the legislation.³¹

The 1926 act was in force until the outbreak of World War II. Trustskontrollen, the official publication of the Trust Control Office, reported in 1938 and 1939 the annual box score of administrative decisions under the 1926 act. These decisions included 18 findings that cartel price or profit regulations were undesirable and therefore were to be discontinued. Eleven regulations regarding competition were ordered discontinued and 113 boycotts and exclusive agreements were ordered terminated.

The formal authority to intervene was given to the Trust Control Board, which acted in accordance with the recommendations of the Trust Control Office. Its decisions were treated as precedents, despite the general notion that *stare decisis* is not applicable to civil-law administrative decisions. Thus, the effect of the decisions was widespread, and the extent of the control activity is shown by the 3,381 revisions of the price lists reported in Trustskontrollen of 1926.

Despite this record, enforcement was not considered very effective because of a loophole in the 1926 legislation which may be found in similar legislation in other countries. Under the 1926 law, only those agreements or arrangements of more than one year's duration needed approval in order to be enforced. Agreements of shorter duration had to be registered, but they were not dependent on approval in order to operate. Thus, arrangements could be made formally to terminate within the statutory period, and then continued on the basis of an "understanding."³² Nevertheless, registrations grew during the life of the 1926 act.

At the beginning of 1929, 188 agreements and arrangements were registered; at the beginning of 1939, 376 registrations were on the books,³³ and as of July 1957, the number registered was 780 which included 502 restrictive associations, 200 restrictive arrangements among enterprises which had not formed formal associations, and 78 dominant enterprises.³⁴ In part, these new figures reflect the stronger registration provisions of the present act as well as the growth of the Norwegian economy. To a degree one may also infer that neither the 1926 nor the 1953 legislation has served, or has

³¹ Law of June 26, 1953, arts. 2, 60.

³² Law of March 12, 1926, as amended, art. 16; see English language text, Restrictive Business Practices, U.N. EcoSoc Council Off. Rec. 16th Sess., Supp. No. 11B, at 161 et seq. (E/2379/add. 2) (1953).

³³ Report of the Ministry of Finance, The Price Act, Enclosure No. 1 to Oslo, Dispatch No. 786, June 3, 1954, p. 57.

³⁴ See Thagaard, *op. cit. supra* note 14, at 7.

been intended to serve, as a complete deterrent to restrictive practices.

For the American interested in doing business in Norway, whether in goods or services, it is important to know that all types of "business activity" are subject to registration.³⁵ Any formal or informal arrangement that is intended to or does result in a restriction on competition falls within the purview of the legislation.³⁶

For dominant enterprise registration the standards involve either control, production, or dealing involving twenty-five per cent or more of the relevant sector of the economy. In addition, those smaller firms which are controlled by or connected with large foreign enterprises or combinations must register. These dominant firms must supply a variety of information as to their activities within Norway.³⁷ Thus, any affiliate or licensee of an American firm of any size is required to register publicly its arrangements with the American firm insofar as they involve the internal Norwegian economy. Further, as a matter of practice, the registration may require some indication of activities outside of Norway when a foreign firm is involved. The rationale for this is Norway's desire to be able to participate properly in any international arrangement for the control of restrictive practices.³⁸ The major administrative agencies under the 1953 act are on two levels. The first level is the Price Directorate, which has a central office in Oslo and local offices throughout Norway. The majority of cases and registration are handled at this level. The major decision-making body is the Price Council made up of five members, the present chairman being a member of the Supreme Court of Norway. Above the Council is the Minister of Finance.³⁹ Of special interest is the way in which policy guidance is developed for the various organs administering the law. The King (actually the Cabinet) annually gives to the Parliament a statement of policy to guide the administration for the coming year. This is debated in the Parliament and may actually be changed if the Parliament has very strong views on the matters involved.⁴⁰ On this basis, it may be seen that administrative decisions and policy may lack certainty if new conditions warrant changes in policy.

The act contains certain basic requirements and prohibitions. Arti-

³⁵ Law of June 26, 1953, art. 2.

³⁶ Law of June 26, 1953, arts. 32-33, 35.

³⁷ Law of June 26, 1953, arts. 32, 34-35.

³⁸ Law of June 26, 1953, arts 34, 44; see also Thagaard, *op. cit. supra* note 14, at 16-19.

³⁹ Law of June 26, 1953, arts. 3-9.

⁴⁰ Law of June 26, 1953, art. 14.

cle 18 prohibits improper prices and improper or socially detrimental business practices. Article 20 requires that prices be clearly marked on tags or the like and that statements, invoices, or receipts be issued for each transaction. Article 21 prohibits the carrying on of unnecessary and cost-enhancing middleman activities. Article 22 should be of interest to students of the Federal Communications Commission. It forbids, without consent of the Price Directorate, the requesting or receiving of compensation for transfer of a business license.

The 1953 act also vests power to control prices, dividends, and profits in the administrative agencies.⁴¹ At present, profits and dividends of approximately ten per cent of the enterprises are in fact controlled.⁴² Apparently, such control has been considered necessary to ensure effective operation of the entire regulatory structure. Profit and price structures are reported, and the administrative agencies may change them retroactively if it is felt that such prices and profits represent an undue utilization of the power derived from the restrictive practices.⁴³

In 1956, temporary legislation was enacted to prohibit changes in profit rates and prices by parties to restrictive arrangements without prior approval of the Price Directorate.⁴⁴ Dominant enterprises were left subject to the previous controls. This may be considered some evidence of the degree to which it has been necessary to balance the power of restrictive practices by greater amounts of governmental intervention.

Among the regular powers of the King, through the Price Council, is the power to review the private enforcement activities of the trade associations. Thus, boycotts, limitations on freedom of entry, fines, refusal to deal, and similar activities are subject to review and may be altered or enjoined. This power extends to the breaking up of associations and arrangements.⁴⁵ A further limitation on restrictive arrangements is the requirement that a participant in a restrictive agreement or arrangement must so indicate when he tenders a bid to someone inviting such tenders.⁴⁶ The courts may review the constitutionality of the decisions made, but there seems

⁴¹ Law of June 26, 1953, arts. 24-31. Note that article 28 gives the Storting (Parliament) the right to set dividend rates annually.

⁴² See Thagaard, *op. cit.* *supra* note 14, at 4.

⁴³ Law of June 26, 1953, arts. 24-31.

⁴⁴ See note 30 *supra*.

⁴⁵ Law of June 26, 1953, arts. 23, 40-42.

⁴⁶ Law of June 26, 1953, art. 39.

little likelihood that they will be declared unconstitutional.⁴⁷ Violations of law and decisions of the administrative bodies are subject to criminal penalties that may be as high as imprisonment for three years and fines.⁴⁸ Unlawful prices and profits are subject to forfeiture.⁴⁹

It would seem that such broad controls would in themselves be sufficient. However, beginning May 1, 1958, another mode of control was instituted. On the basis of Price Directorate studies of the spread of resale price maintenance, and a determination that the effect of such practices is harmful, a Royal Decree having force of law was issued on October 18, 1957. Under this decree an individual supplier may not, beginning May 1, 1958, fix resale prices or mark-ups without prior approval of the Price Directorate. Dealers, however, may be advised of suggested prices as long as it is made clear that they are free to price as they wish. Any coercive activity, no matter how subtle, may be prohibited by the Price Directorate if it is found that the practices hamper effective price competition. Any coercion as to price is thus automatically a violation of law. The activity under the ban may be either by the supplier or a trade association or a third party. Collective activities by suppliers concerning price suggestions are subject to more rigorous standards than individual supplier activity. Exemptions from the resale price-maintenance ban rest on ability to show that the requested price fixing aids rational productivity or otherwise benefits the public. It should be recognized that horizontal price fixing is not within the purview of the ban, even at the retail level. Horizontal agreements are, however, under study with a view to possible future legislation.⁵⁰

Norway justifies its network of control legislation on the theory that the economy of a small country dependent on imports cannot operate without some forms of restrictions, and conversely, that restrictions may get out of hand if not controlled. The Norwegian experience may well be indicative of future developments in similar systems of control now in force in the Netherlands, the United Kingdom, Germany, Denmark, Sweden, Austria, and Japan. It is highly significant that each attempt to enact a comprehensive control system is in a short time demonstrated to be inadequate, and

⁴⁷ See *Norwegian Whalers' Ass'n v. Norway*, Norsk Rettstidende 1089 et seq. (1952); for a discussion concerning constitutionality, see Report of the Ministry of Finance, The Price Act, Enclosure No. 1 to Oslo, Dispatch No. 786, June 3, 1954, pp. 102-16.

⁴⁸ Law of June 26, 1953, arts. 52-59.

⁴⁹ Law of June 26, 1953, arts. 56-57.

⁵⁰ See Thagaard, *op. cit.* supra note 14, at 11-13.

further controls are found necessary to keep the previously considered "good" restrictive practices in check.

An American doing business in any form, whether by license or otherwise, in Norway and in the enumerated countries having somewhat similar legislation, will find that he must register and, in some instances, obtain permission for the restrictive activities he contemplates. He must know that certain practices are no longer legal or may not be treated as such within the discretion of the administrative agencies. He must recognize that administrative policy is subject to annual change. The simplest way to do business in the registration countries would be to assume that the Sherman and Clayton Acts are in force and that resale price maintenance is probably illegal and in some instances prohibited. Although it would be vigorously denied that anything like our antitrust legislation is in force, the practical effect is the same. Naturally, there are exceptions as is seen upon examination of the differences between Norwegian and similar legislation, but in the long run, counsel should advise his client that the better practice is: No anti-competitive arrangements are permitted unless some overriding factor makes consideration of such practices apparently necessary.

B. Ireland

Ireland enacted its legislation in 1953. Law No. 14, the short title of which is the Restrictive Trade Practices Act, became law on May 7, 1953, under the title, "An Act Concerning Restrictive Trade Practices in Regard to the Supply and Distribution of Goods."⁵¹

As the long title and the legislative debates indicate, the act is a response to public concern over restrictive practices in the supply and distribution of goods which seem to be inconsistent with the general public welfare. The volume of complaints to the Department of Industry and Commerce had reached proportions which could not be ignored. Credit is also given by the Irish to the American experience and the educational process, which was discussed earlier in this Article.⁵²

The act is not concerned with monopoly or size of an enterprise. The administrative organ, the Fair Trade Commission, consisting of a chairman and between two and four other full-time members,⁵³

⁵¹ Restrictive Trade Practices Act, Stationery Office (Dublin) (1953). This statute will hereinafter be referred to by part, section, or schedule number.

⁵² See unpublished manuscript by John J. Walsh, member of Fair Trade Commission, International Conference on Restrictive Business Practices, Chicago, Jan. 16, 1958, pp. 1-2.

⁵³ Part I, § 2, first schedule, § 1.

is given two tasks. The Commission is to prepare and publish Fair Trading Rules for industry, similar to the activity conducted by the Federal Trade Commission. The conducting of public enquiries is the heading for its wide jurisdiction and powers.

The Fair Trading Rules may begin either by request of a trade association or upon the Commission's own initiative. Notice and hearings are required and the rules may cover not only the conditions of supply and distribution of goods, but also services which may affect the supply and distribution of the goods in question. The rules must be reviewed and nonobservance is reported by the Commission to the Minister. At this stage nonobservance does not mean a penalty.

Enquiries are the major function of the Commission and may be initiated by it, with or without an outside complaint, or may be ordered by the Minister for Industry and Commerce. If a complaint to the Commission does not result in an enquiry, the complainant must be furnished with a statement setting forth the basis for such a decision. The subject matter of the enquiries is limited to the supply and distribution of goods and relevant services. Unless there is likelihood of disclosure of confidential information, the proceedings are to be entirely in public and a matter of public record.

It might be well to note that one new feature of much, but not all, of the new restrictive practices legislation of all types is the element of public disclosure. Most proceedings and registers are open to the public. This is indeed a new departure. The prevailing climate in much of Europe has heretofore been toward strict business secrecy buttressed by laws against economic espionage. Apparently, there is a realization that public support of governmental efforts will not only strengthen the position of the administrators, but also provide a basis for obtaining needed additional information.

Upon the conclusion of the enquiry, the Commission is required to report in full to the Minister on the conditions in the trade. This requirement also applies to reports dealing with nonobservance of trade-practice rules. The report of the enquiry must disclose whether, and if so, how the conditions that prevail prevent or restrict competition, restrain trade, or involve resale price maintenance. Finally, the Commission must give its opinion on the relationship between the interference with competition and the public interest and the reasons for such conclusions. If the Commission believes that a ministerial order is desirable, a draft accompanies the report. The Minister then places the report before both legislative bodies, thereby giving the public notice of the results. The Minister is free to accept

or reject any or all recommendations in the report, promulgate an order of his own drafting, or decide that there is no need for an order.

If the Commission has recommended an order and if the Minister has decided not to issue one, then within three months he must give both legislative houses a statement of his reasons. A ministerial order is without effect until confirmed by the legislature,⁵⁴ which must either accept or reject the order without amendment.⁵⁵

The scope of the order is broad, and the Minister's powers are without serious limitation. An order may prohibit specified arrangements or agreements; prohibit the withholding of goods or services from a specified class of persons; prohibit preferences in orders for supplies or services; prohibit specified conditions governing supply or distribution; and, finally, there are two general clauses which allow the Minister to take action necessary to ensure equitable treatment of all persons to avoid unfair practices and to control restrictive practices.⁵⁶

The Commission has a duty to review the operation of the legislative orders and the general effect on the public interest of any restrictive practices and may report to the Minister on its findings.

The legislative orders may be enforced by injunction on the motion of any person. Violation of an order is a criminal offense, and individual officers are deemed to be guilty if a corporation is judged guilty. Penalties may be as much as 5000 pounds plus a maximum of 500 pounds per day for a continuing offense. Penal servitude may be for as many as ten years. The various penalties may be joined together.⁵⁷

Although the act contains no specific prohibition of practices, eleven unfair trade practices are enumerated without being intended to be exclusive or exhaustive. Each practice is qualified, so, in effect, there is the operation of the rule of reason. Words such as "unreasonably," "unjustly," and "likely" modify each denominated practice. The practices include: restraint of free and fair competition; restraint of trade; elimination of a trade competitor; enhancement of the price of goods or the promotion of the unfair advantage of suppliers and distributors at the expense of the public; the securing of a substantial or complete control of the supply or distribution of goods or a class of goods contrary to the public interest; refusal to deal and preferential treatment; geographical quotas or restrictions

⁵⁴ Part I, §§ 4-10.

⁵⁵ Part I, § 9; see also Walsh, *op. cit.* supra note 52, at 5.

⁵⁶ Part I, § 9.

⁵⁷ Part I, §§ 10-14.

on dealing in competitor's goods; and restriction on freedom of entry. The schedule of practices refers to acts by individuals, combinations, mergers, cartels, trusts, and monopolies. This effectively gives the Commission jurisdiction over the activities of individuals who are not monopolists as well as all forms of combination and monopoly.⁵⁸

As is true in the other legislative systems, the Commission has subpoena power over persons and documents and the right to examine under oath.⁵⁹ These powers are to be found in all of the systems of legislation enumerated thus far. The Irish Commission must make an annual report to the Minister, which report is made public by its presentation to both houses of the legislature.⁶⁰ This insistence on publicity is calculated and clearly intended. The Irish legislation in some respects is duplicated by that of the Union of South Africa and New Zealand, and some major features are reflected in the German, Swedish, Japanese, and Canadian legislation.

The Irish legislation is very broad in its effect though it deals with the distribution and supply of goods and related services. It specifically does not mention production for several reasons. The country is not highly industrialized; moreover, Ireland is seeking to encourage foreign industrialization. Practically, this apparent lack of control over production is not a major loss in controlling restrictive practices. Restrictions in production which cannot be related to restrictions in distribution are normally meaningless. Thus, subject to the actual policy of administration, the Irish legislation could be most effective. Some evaluation of its effectiveness will be possible when enforcement results are subsequently discussed.

An earlier Irish enactment is of particular interest in this day of widespread and growing patent-licensing arrangements. Any person may apply to the Controller of Patents for relief against the abuse of the patent monopoly. Abuse includes: nonuse of a patent three years after the date of application unless it is found that insufficient time has elapsed, considering the nature of the patent, to make commercial use practical; nonuse on a commercial scale caused by importation of the patented article by the patentee or his licensees or infringers against whom the patentee has not acted; limited production unable to meet demand, considering the demand that might exist if prices were lowered; unreasonably high prices for a patented article when compared with prices in other countries;

⁵⁸ Second schedule.

⁵⁹ First schedule, §§ 6, 8.

⁶⁰ First schedule, § 11.

and unreasonable licensing restrictions. There are other related forms of abuse prohibited as well. Upon a determination by the Controller of an abuse, he has broad powers to set the terms of compulsory licensing, and he may even revoke the patent.

Other provisions of the legislation relate to providing a fair royalty to patentees under the penalty provisions and place limitations on general licensing, assignment, grant, or leasing arrangements. These latter include a ban on tying clauses and a ban on restricting the licensee, assignee, lessee, or purchaser from using someone else's patented article or process or an article or process in the public domain. Some exceptions from this prohibition are provided.⁶¹ This legislation, when read in conjunction with the newer legislation on restrictive practices, discloses a far-reaching intention by the Irish to strike directly at many practices which are now illegal by judicial interpretation of our own antitrust laws. Moreover, practices which are legal in this country, such as nonuse, are prohibited. The patent legislation speaks eloquently for itself, and to some degree similar legislation is to be found in almost every country of the free world.⁶² Thus, patent nonuse and misuse problems which have troubled our courts have been made the subject of legislation which has a direct bearing on foreign registration of American patents and the various forms of licensing, assignment, and other arrangements dealing with the transfer of certain rights of patentees.

C. France

France, a keystone of the new Common Market and a focal point for American investment, has built its control of restrictive business practices around a prohibition of resale price maintenance. Of course, other countries have banned this form of price fixing, but France is unique in the form and emphasis involved in its experiment with this type of control.

The decree of August 9, 1953,⁶³ which is the effective current law, is a Cabinet decree with force of legislation, resulting from a legislative delegation of plenary powers to the Cabinet after the failure of the two parliamentary bodies to agree on a bill after months of

⁶¹ An Act to Make Provision for the Granting of Patents for Inventions, the Registration of Designs and Trade Marks, and the Definition and Protection of Copyright in Saorstát Éireann, The Public General Acts Passed by the Oireachtas of Saorstát Éirann, May 20, 1927, Stationery Office (Dublin) (1928), see especially § 43.

⁶² For a compendium of similar legislation, see Restrictive Business Practices, U.N. EcoSoc Council Off. Rec. 16th Sess., Supp. No. 11B (E/2379/add. 2) (1953); *id.*, 19th Sess., Supp. No. 3 (E/2671) (1954).

⁶³ Decree 53.704, Aug. 9, 1953, *Journal Officiel*, Aug. 10, 1953.

debate.⁶⁴ In view of the antecedent ordinances which the decree of August 9, 1953, amends, it is logical that resale price maintenance and related practices are the major concerns of the legislative scheme.

On June 30, 1945, two ordinances by the Ministry of National Economy were promulgated. The first dealt with price⁶⁵ and the second with penalties for violations of economic legislation.⁶⁶ The first ordinance in article 37, as amended, created the following categories of illicit price practices: (1) refusal to sell or to supply services in response to a normal demand; (2) price discrimination not justified by cost factors; (3) limiting sales or services to special times when, in fact, the enterprise was open to sell other products or provide other services; (4) tying clauses involving either goods or services and the imposition of a minimum quantity restriction; (5) hoarding; and (6) imposition of minimum prices for goods or services without permission of the interested ministry, with brand name goods being subject to special regulation.⁶⁷

The second ordinance provides the basis for application of the criminal court sanctions to violations of the first ordinance and the 1953 decree.⁶⁸

The decree of August 9, 1953, bears the title, "Decree 53.704, Relative to the Maintenance or Reestablishment of Free Industrial and Commercial Competition." It is accompanied by an exposition of objectives in which the following purposes are enumerated: (1) termination of practices which, by restraining proper commercial competition, prevent any reduction in price; and (2) establishment of the principle of prohibiting all practices which conflict with the full exercise of competition by preventing the reduction of resale or other selling prices.

The decree proceeds to implement the objectives by prohibiting in article 59 *bis*, subject to qualifications by article 59 *ter*, all forms of concerted action, formal or informal ententes (cartels), or agreements having as their object or capable of interfering with competition by serving as an obstacle to reduction of retail or other sales

⁶⁴ Loi 53.611, July 11, 1953, see Circulaire No. 65, Secretariat d'Etat aux Affaires Economiques (Paris), March 31, 1954, p. 1.

⁶⁵ Ordonnance du Ministere de l'Economie Nationale, 45.1483, June 30, 1945, Journal Officiel, July 8, 1945.

⁶⁶ *Id.* at 45.1484.

⁶⁷ Amendments are found in Loi 46.1024, May 14, 1946; Loi, April 4, 1947; Loi 52-835, July 18, 1952, Journal Officiel, July 19, 1952.

⁶⁸ Ordonnance du Ministere de l'Economie Nationale, Title V, June 30, 1945, Journal Officiel, July 8, 1945. The maximum possible term of imprisonment is five years. The maximum fine, adjusted according to the laws of May 24, 1946, September 25, 1948, and April 14, 1952, is 200 million francs, which is approximately \$500,000.

prices or resulting in artificial and discriminatory price increases not justified by costs.

Article 59 *ter* removes from the purview of the previous section combinations, etc., created by legislative or administrative action. Further possible exemption is available to those able to prove that the arrangement is capable of improving or extending the market or that the arrangement will ensure economic progress through rationalization and specialization. The burden of proof is the same whether brand name goods are involved or not.

Article 2 of the decree amends article 37 of the first of the June 1945, ordinances by strengthening the language prohibiting any businessman, industrialist, or artisan from refusing to sell or provide services in response to a bona fide demand that is not abnormal.⁶⁹ A further addition to article 37 is its application to any person responsible for concerted action to engage in or encouraging others to engage in those practices prohibited by article 59 *bis*. Thus, the scope of the legislation, as far as those subject to its jurisdiction, is rendered comprehensive.

Article 37 is further strengthened by clearly prohibiting any form of minimum price fixing for goods and services, whether accomplished by markups, suggested prices, or any type of agreement. No longer are brand name goods in a special category.

The legal implementation is in several forms. Parties may plead the decree as a defense in an action to enforce a prohibited practice heretofore the subject of an agreement or arrangement. To some extent third parties may also avail themselves of the plea. Moreover, under the provisions of article 1382 of the Civil Code,⁷⁰ private litigation will lie for an injury arising from an illegal restrictive business practice. This is the basis for the private litigation that will be discussed later. Further, the courts may order criminal penalties as well as damages to reimburse the party injured by the practices.

The decree does not mention monopolies as such, but the ways a monopoly could come within the purview of the law are set forth subsequently.

In order to clarify the meaning of the three major prohibited practices and other matters, the Ministry of Economic Affairs is-

⁶⁹ The decree has removed the 1945 requirement that the trader must have retained the goods he has refused to sell as a prerequisite to liability. Prospective purchasers must now be bona fide, a requirement that did not previously exist. The prohibitions against time limitations on sales and services, tying clauses and minimum quantity requirements, and hoarding in the first ordinance of June 30, 1945, are continued in effect by the August 9, 1953, decree.

⁷⁰ Code Civil, Petits Codes Dalloz (Paris) (1955). [This is also found in the current edition of Codes et Lois, Juris-Classeurs (Paris)].

sued an instruction commenting on the decree.⁷¹ The observation is made that discriminatory price increases and refusals to sell are standard devices to enforce minimum price fixing. Thus, in outlawing minimum price fixing, it was necessary that the related practices also be banned. The ban does not extend to exclusive dealing arrangements, which appear to be increasing in France at present and which may well be the subject of new legislation very shortly.

The elements to be proved when alleging a refusal to sell are set forth and include: (1) the refusing party carries on a trade, business, or craft; (2) a statutory or administrative regulation prohibiting the sale of the goods or the supplying of the services is absent; (3) the refusing party had the products requested and they were for sale, or the products could have been obtained without depriving those to whom earlier commitments for delivery had been made; and (4) the request was both normal and bona fide.

The major defenses are related to the available supply of goods, considering the ordinary needs of the purchaser or the normal output of the producer. An exclusive agreement is a defense, but the Ministry requires that such exclusive arrangements meet certain minimum tests. It must be shown that the contract improves the service to the consumer, does not raise prices or keep them at a high level, or does not reduce sales volume below market demand. A further requirement is that a bilateral, exclusive contract binds just the two parties, with the entire output reserved for the purchaser. In the case of multilateral, exclusive contracts, there must be reciprocal obligations of a specified nature between the seller and each purchaser. These would include the guarantee by the seller to protect the purchaser's exclusive right in a given territory. The purchaser must agree to and actually carry out such obligations as the duty to repair, to keep a supply of spare parts, to refrain from selling competing goods, or to share in the costs of advertising.

In no way are integrated concerns affected by such limitations. However, if any producer sells to wholesalers, he must sell to any member of the business community who wishes to purchase on wholesale terms. Similarly, if producers normally sell to retailers, then any member of the business community may demand the same terms. The prohibition against discriminatory higher prices is deemed to be for the protection of consumer cooperatives, discount houses, and others who may not always meet with favor in the business community.⁷²

⁷¹ Circulaire, Feb. 15, 1954. *Gazette du Palais*, 1954, L. 566.

⁷² This summary is from the *Circulaire*, *supra* note 71.

At the heart of the French system is the administrative agency created by the 1953 decree. Article 59 *quater* creates a Technical Commission for Ententes with a member of the Conseil d'Etat as President. Five other members may be chosen from the Conseil d'Etat, which is the highest administrative court, the Cour de Cassation, which is the supreme court, other judicial courts, or the Cour des Comptes, which is similar to our General Accounting Office. Four members are to come from professional organizations and two more from the National Productivity Committee.⁷³ The Technical Commission has the duty to examine violations of article 59 *bis* and defenses under article 59 *ter*. Decisions and opinions are by majority vote. The Commission has broad investigative powers based on the first ordinance of June 30, 1945, and it is required to meet with the interested parties and give them a hearing. A secretariat which functions as the coordinator of investigations is provided. Provision is made for the transmission of cases to the public prosecutor by the Minister of Economic Affairs for prosecution under either article 419 of the Penal Code⁷⁴ or the second ordinance of June 30, 1945.

By decree 54-97 of January 27, 1945,⁷⁵ the government established the administrative procedures for the Technical Commission. Article 12 prohibits public hearings and public meetings of the Commission, and this principle is amplified by article 19 which makes the work of the Commission secret in its entirety. Article 20 provides for an annual report, but the report is to be made to the Minister of Economic Affairs, and he has not chosen to transmit much of that information to the public.

Of major importance is article 17 which provides that the Minister, before arriving at a decision based on the recommendations of the Commission, which decision could lead to prosecution, may invite the interested parties to take the necessary measures to maintain or re-establish free industrial and commercial competition. This effectively gives the Minister the power to negotiate a secret consent decree.

In order to clarify the meaning of these regulations and the scope of the activity of the Technical Commission under the decree of August 9, 1953, the Ministry issued its Circulaire No. 65 on March

⁷³ This is recognition of the effect of the Productivity Program of the Marshall Plan. The word "Productivite" came into the French language as a result of that program.

⁷⁴ Penal Code of 1810, as amended, Code Penal, Petits Codes Dalloz (Paris) (1955). [This may also be found in the current edition of Codes et Lois, Juris-Classeurs (Paris)]. See also the related articles 412, 420, and 421.

⁷⁵ See note 64 *supra*, Annexe 4, Circulaire No. 65, pp. 23-25.

31, 1954. It has the virtue of telling the public with some precision how broadly the basic law is interpreted.

It is made clear that not all cartels or combinations are forbidden. As long as a cartel does not have a "fatal" effect on prices, it is legal. On the other hand, the legislation is interpreted as prohibiting any form of combination which eliminates competition without meeting the requirements for exemption set forth in the decree. Thus, article 59 *bis* of the decree is interpreted as applying to all forms of arrangements or concerted actions, express or tacit, no matter what form they may take, if they could obstruct the full play of competition. Neither the economics or legal form of the cartel nor other arrangement will in itself prevent the application of the decree.

No matter what legal entity or form the arrangement takes, it is not sufficient to insulate the responsible individual persons from personal liability or punishment in the event of a violation of the law. This view is based on the application of the second ordinance of June 30, 1945, particularly article 56. Under this article it is not necessary to prove an intent to do the wrong, though such proof is a prerequisite to the application of article 419 of the Penal Code.

The decree is considered to be territorial, and jurisdiction is not based on nationality or domicile. Thus, foreign corporations participating in a French restrictive arrangement are liable, but export cartels or similar arrangements which have no domestic application are outside of the prohibition.⁷⁶

Three elements must exist to bring a cartel or combination within the area of violation. There must be observable practices which result in an entente.⁷⁷ These practices must have an effect on competition that is at least susceptible of affecting price.⁷⁸ Finally, the practices must not be entitled to an exception under article 59 *ter* of the decree of August 9, 1953.⁷⁹

In determining the existence of an entente, there is excluded what is considered a "bathtub conspiracy," an intra-enterprise con-

⁷⁶ Circulaire No. 65, pp. 4-6.

⁷⁷ The word "entente" literally means an agreement between producers, distributors, etc. It has become the French equivalent of "cartel," but within the context of the legislative scheme, it is used to cover all types of agreements, arrangements, and understandings involving two or more participants.

⁷⁸ Cf. the decision in *United States v. Socony Vacuum Co.*, 310 U.S. 150 (1940), which brought under the ban of § 1 of the Sherman Act practices indirectly affecting price.

⁷⁹ Circulaire No. 65, p. 8. The 59 *ter* exemptions rest on legislative or administrative acts or a showing that markets are improved or extended or that economic progress is enhanced through rationalization and specialization.

spiracy.⁸⁰ Moreover, permitted ancillary restrictions involving patents are not within the scope of the legislation.⁸¹ Although, strictly, monopolies are outside the scope of the legislation, the Instruction warns that the Commission must watch for monopolies built upon agreements involving the monopoly and former or potential competitors who have given up the market in question in return for some benefit, such as a monopoly in another field. Activities tending to create a monopoly through merger, exchanges of stock, purchase, use of a common sales agency, and similar activities leading to market domination are considered to be within the jurisdiction of the Commission and under the legislation.⁸²

Among the forms of joint activity which would be considered legal absent other arrangements are those leading to possible lowering of prices through joint product, market research, group advertising, or like collective activities. However, such joint practices as limitation of production or sales volume, penalization for exceeding sales quotas, division of sources of supplies of raw materials, sharing of orders, or division of markets on a geographical or professional basis are all deemed to affect price adversely.⁸³

As for the exceptions provided by article 59 *ter*, technical progress is only one factor of the concept of "economic progress" which the entente must prove it is developing. In order to justify an exemption it must be shown that the entente has caused either a lowering of price or an increase in quality without raising price. The development of an export market may justify a domestic entente as long as it does not cause an increase in domestic prices. The conclusion is reached that an exemption must be based on proof of a salutary effect on prices.⁸⁴ The interpretation of the exemption or derogation features of the legislative scheme is in fact one that is most susceptible to lobbying and similar pressures.⁸⁵

⁸⁰ Ibid. Here the emphasis is placed on the economic unity of the enterprise. It is not clear what interpretation will be placed on an agreement between a parent and a subsidiary when each of them enjoys the status of a separate legal entity.

⁸¹ Ibid. The French patent law is not unlike the Irish legislation previously discussed. The laws governing patents may be found in Code de Commerce, Petits Codes Dalloz (Paris) (1955). In general, it may be said that licensing or patent assignments which are designed to prevent competitors from exploiting the invention are legal. Thus, an exclusive license or an agreement not to compete by an assignor of a patent is not barred.

⁸² Id. at 8-9.

⁸³ Id. at 9-10. This administrative interpretation resembles a large body of American case law tediously developed over many years of litigation. Cf. discussion in Report of the Attorney General's National Committee to Study the Antitrust Laws 5-30 (Washington) (1955).

⁸⁴ Id. at 10-11.

⁸⁵ Although no official exemption has been published for pharmaceuticals, both prescription and nonprescription, and other drugstore items, fixed prices continue and are not as yet prosecuted or investigated. A comparison of the ability of the French drug in-

Two types of investigations are called for in the *Circulaire*. The preliminary investigation is a process of fact finding which goes no further than providing background information for the files of the Secretariat.⁶⁶

The major investigation is the one which puts the entente to the various tests and which may lead to the secret consent decree or a prosecution. The authors of the *Circulaire* have doubts about the possibility of being able to find written evidence of agreements that remain in force after the decree. However, the law is interpreted as permitting proof by circumstantial evidence and presumptions. It is assumed that some helpful information can come from dissidents outside the entente and from those who purchase goods from or utilize services of the entente. Among the factors given weight in determining the existence of a clandestine entente is price uniformity in light of different rates of profit. Moreover, if offers to supply goods or services from several enterprises reach a total approximately equal to the needs of the potential purchaser, it is deemed evidence of a market-sharing agreement.⁶⁷ This use of circumstantial evidence should not be unfamiliar to students of American antitrust law.⁶⁸

Once the existence of the entente is established, the next step in the investigation is proof of the effect on price. The investigators have the burden of proving that in fact the entente has had a deleterious effect on price. This proof can be effected by various forms of price comparison. If part of an industry is cartellized and part is free, a comparison of prices related to profit rates can be used to show the adverse effects of the arrangement. Partially cartellized industries are, however, atypical. It is also possible to make a price comparison considering the profit rates before and after cartellization of an industry. Since this form of comparison is difficult, a study of the relationship between price and profits of efficient and inefficient members of the cartel will suffice. The existence of abnormal profit for the more efficient members is all that need be demonstrated. A study of unused capacity in the efficient enterprises to show how much more could be produced under competitive conditions is also permissible. Moreover, a comparison between prices in France and other countries for

dustry to avoid investigation, and the lobbying activity of The National Association of Retail Druggists and related organizations, on behalf of resale price maintenance would seem appropriate.

⁶⁶ *Circulaire* No. 65, pp. 11-12.

⁶⁷ *Id.* at 13.

⁶⁸ Cf. Report of the Attorney General's National Committee to Study the Antitrust Laws 36-42 (1955), discussing conscious parallelism and proof of conspiracy under § 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

similar goods and services, allowing for basic differences in the respective economies, is considered a particularly valuable method of proof.

The Circulaire considers proof of exemption by legislative or administrative act a simple matter of showing the official records. As to the exemption based on economic progress, the Commission is given the broad authority to establish its own standards.⁸⁹

The balance of the Circulaire is concerned mainly with the internal organization of the Technical Commission and the Secretariat. Finally, there is an explanation of the extent of the power of the Minister in negotiating the secret consent decrees. There is general power to meet the particular facts of a case and conditions of an industry. Examples, by no means exclusive, of conditions that might be imposed on an entente are: (1) change of the statutes of the entente; (2) change of commercial policies; (3) compulsory price reductions; and (4) required furnishing of cost justifications and periodic reports permitting control of prices and profit margins. Departmental heads of the bureaus of the ministries involved are to be notified of the terms of the instructions so that they can oversee the execution of the orders.⁹⁰ However, no provision is made for public information to buttress enforcement or for notification to those who purchase goods or utilize services of the ententes. Thus, a baker might never learn that he is free to buy yeast from more than one manufacturer at a competitive price.⁹¹

D. The European Coal and Steel Community

M. Jean Monnet, the first President of the High Authority and major architect of the treaty which came into force on July 25, 1952, has described articles 65 and 66⁹² as "Europe's first major antitrust law."⁹³ The extent to which hope and reality are related may well provide a guide to the results that will be obtained from articles

⁸⁹ Circulaire No. 65, pp. 14-15.

⁹⁰ Id. at 19-20.

⁹¹ Rapport Annuel de la Commission Technique des Ententes au Ministre Charge des Affaires Economiques (Paris), Dec. 31, 1955, pp. 14-17. This, the Commission's first annual report to the Minister, is still classified as "confidentiel." It is an excellent report reflecting a high degree of professional competency, dealing in this instance with the yeast cartel which the Commission recommended be broken, September 24, 1955. The Report indicates that the Minister has accepted this recommendation. Involved was a classic cartel, created by the Vichy government with production quotas, penalties for overproduction, and indemnities for underproduction. Identical prices and conditions of sale and geographic division of markets gave the bakers no choice. Moreover, the cartel paid the owners of closed enterprises normal rates of profits for not producing.

⁹² The text consulted was the unofficial English language version published by the High Authority and printed in Great Britain by the Fanfare Press, Ltd., London.

⁹³ High Authority Information Documents, No. 2, The High Authority and The Trusts (Luxembourg), Sept. 1, 1955, p. 2.

85-90 of the Treaty Establishing the European Economic Community, the Common Market.⁹⁴

Article 65 of the Coal and Steel Treaty starts by a rule of prohibition against concerted practices tending directly or indirectly to restrict competition. It then gives examples including price fixing, limitation on production, and allocation of markets, customers, or sources of supply. This short statement is then followed by a very long one giving the conditions under which the High Authority may authorize periods of time agreements to specialize in production or to engage in joint buying and selling activities. These conditions include a showing that the activities will improve the economy, are essential to achieve such results, and will not give power to determine prices or the production of the commodity in the market. The loophole is further extended by giving the High Authority the right to exempt "analogous agreements," which term is not strictly defined. The remainder of article 65 is devoted to procedural matters such as the right of the High Authority to obtain information and the right to decide cases and assess penalties, subject to appeal to the court.

Article 66 deals with concentration of power and starts with the presumption that concentration is proper unless proved otherwise. Transactions involving concentration must be authorized by the High Authority, and authorization is to be granted unless it is found that the concentration will give power to control production, determine prices, or restrict competition in a substantial part of the market for the products involved. The High Authority must determine what is meant by control of an enterprise as a prerequisite to applying the concept of concentration. It is assumed that control may exist in other forms than by merger, acquisition of shares, contracts, and similar devices. Further, the High Authority may exempt certain transactions by reason of size from the requirement of prior authorization. Provision is made for breaking up concentrations, invoking penalties, and related matters.

No provision governing export cartels as such is spelled out. Some persons argue that the language of article 65 forbidding concerted practices restricting or distorting competition within the Coal and Steel Market could be applied to export cartels. The theory is that export cartels cannot exist without affecting the Common Market in some way. Certainly, pricing practices of the export cartel and the resultant demand or lack of demand for products outside of the

⁹⁴ The text used is the mimeographed provisional translation issued by the Community's Information Service (Washington), May 6, 1957.

Common Market are reflected in the availability, price, and production of goods for use in the Common Market. Export prices higher than community prices in a seller's market divert production from the community and create a scarcity.⁶⁵

The High Authority has issued a series of decisions designed to implement articles 65 and 66. Decision 37/53⁶⁶ required existing cartels to register. Subsequently, sixty-three cartels were registered.⁶⁷

In order to implement article 66, three regulations were promulgated in 1954.⁶⁸ The first regulation defines control of an enterprise. Ownership of assets, influence on management, control over supplies of materials, and similar forms may be control, but they are significant only if the person or persons concerned are able to determine the operation of an enterprise as to production, prices, investments, supplies, sales, and allocation of profits. Lenders of capital such as banks and banking houses are treated liberally, and therefore are not regulated under the control concept as long as they do not exercise voting rights.

The second regulation sets up the criteria for exemption from prior authorization for small concentrations. Exemption is granted where the concentration will not result in a volume of production sufficient to constitute an efficient operating unit. Vertical concentration is also permissible. The limit for crude steel production is set at 1.2 million metric tons. Similar limits are set for other products.

The third regulation defines the obligation of those not subject to the jurisdiction of the High Authority to submit information. There is a distinction between a request and a compulsory obligation. Obligation exists when an interest holds more than ten per cent of the capital of an enterprise in the Community, representing a total dollar value exceeding \$100,000. Banks acquiring assets on behalf of clients or as trustees are exempt. This is an application of the business secrecy privilege concept. The type of information to be given relates to the acquisition and exercise of the ownership involved.

⁶⁵ Troisième Reunion Jointes des Membres de l'Assemblée Consultative du Conseil de l'Europe et des Membres de l'Assemblée Commune de la Communauté Européenne du Charbon et de l'Acier (Strasbourg), Oct. 27, 1953, Exposé du Rapporteur de la Commission des Questions Économiques de l'Assemblée Consultative, pp. 34-35.

⁶⁶ Decision 37/53, July 11, 1953, Official Gazette of the Community, No. 10, July 21, 1953.

⁶⁷ The High Authority, Report on the Situation of the Community, laid before the Extraordinary Session of the Common Assembly (Luxembourg), Nov. 1954, p. 96.

⁶⁸ Decision 24/54, Decision 25/54, and Decision 26/54, May 6, 1954, Official Gazette of the Community, No. 9, May 11, 1954. Decision 25/54 was subsequently amended by Decision 28/54, May 26, 1954, Official Gazette of the Community, No. 11, May 31, 1954.

Before evaluating the effectiveness and the implementation of articles 65 and 66 of the Coal and Steel Treaty, as well as other recent administrative and judicial decisions, a brief analysis will be made of the European Economic Community Treaty Restrictive Practices provisions. Because many American firms are already planning to gain the benefits of the eventual, large, integrated market, these provisions and any conjectures concerning their impact are particularly important. At the recent International Conference on Restrictive Business Practices in Chicago during January 1958, European and American expert opinions which, under the rules of the Conference must remain anonymous, seemed evenly divided on the efficacy of articles 85-89. There was agreement that the major danger not covered by the articles is the danger of export cartels exporting outside the Common Market, similar to the Brussels Entente that now exists in the Coal and Steel Community.⁹⁹

Article 85 denominates certain activities as being incompatible with the Common Market and therefore prohibited. The proscribed activities include all agreements between firms, all decisions to merge, and all concerted practices likely to affect trade between the member states¹⁰⁰ and having as their object or result the prevention, restriction, or distortion of the free play of competition within the Common Market. Nothing could appear clearer than this language which is reinforced by reference to five categories of practices which are particularly prohibited. These include: (1) direct or indirect establishment of cost or sales prices; (2) limitation or control of production, markets, and technical development; (3) market sharing or sharing of sources of supply; (4) discrimination in price or terms of sale; and (5) tying clauses. Such agreements or decisions are null and void unless it can be shown that the agreements or concerted practices or decisions will improve production and distribution of goods and promote economic or technical progress while ensuring a fair sharing of the benefits of such improvements or progress with consumers. However, no nonessential restrictions may be imposed, nor may the arrangement lead to the elimination of competition as to a substantial portion of the goods in question.

⁹⁹ The High Authority does not deem that the Brussels Entente (export cartel) is serious, High Authority Information Documents, No. 2, The High Authority and The Trusts (Luxembourg), Sept. 1, 1955, p. 7. However, contrary views are discussed in the European Coal and Steel Community (Part I), Studies in Business and Economics, Vol. 9, No. 3 (Univ. of Md.), Dec. 1955, pp. 17-19.

¹⁰⁰ The phrase, "trade between the Member States," is the key to some of the difficulties in making the article a reality. Jurisdiction is based on inter-member state commerce and is thereby a new concept lacking a body of law. In view of the existence of major cartels in some member states, it is reasonable to guess that a narrow interpretation of the phrase is highly likely.

Article 86 is directed against the action of one or more dominant firms which could take unfair advantage of their position within the Common Market¹⁰¹ or a substantial portion of it. Four examples are given of the types of unfair practices prohibited. They are identical in all but two respects with the list under article 85. Market sharing and sharing of sources of supply are omitted. With reference to limitation on production, markets, or technical development, there is added the further qualification that such actions be to the prejudice of consumers.

Thus far, nothing could be clearer than the fact that restraints of trade and market domination practices are prohibited, save for the cases falling under the exception in article 85. No exceptions are allowed to the prohibited actions by a dominant or combination of dominant firms. The area to which the prohibitions apply, however, is not so clear.

Article 87 requires that the two executive organs of the Common Market, the Commission and Council, in consultation with the Legislative Assembly issue appropriate regulations within the first three years of the life of the treaty in accordance with alternative voting procedures. The regulations are to ensure enforcement by the institution of fines or means of compulsion and to implement the exemptions in article 85. A possible sign of weakness in articles 85 and 86 is the requirement in article 87 that the regulations define the scope of those articles with respect to various sectors of the economy.¹⁰² The other regulations are to deal with the jurisdictional relationships between the executive and the court and the relationship between national laws and the articles of the treaty. Until the regulations are issued, each member state is, according to article 88, to pass on the practices in its own jurisdiction.¹⁰³ Article 89 empowers the Commission to undertake an immediate investigation of infringements of the principles of articles 85 and 86 with or without the collaboration of member states. The Commission is also to supervise the application of the principles of articles 85 and 86 even before the regulations are promulgated. This includes the power to decide if an infringement of a principle exists and the power to authorize the appropriate member states to act.

¹⁰¹ Article 86 also contains the key phrase discussed in note 100 *supra*.

¹⁰² The implication is that certain sectors of the economy may or may not be able to survive competition as well as others.

¹⁰³ This may be meaningless because no member state controls export cartels which would appear to be the only ones affected by the Treaty, insofar as the cartels operate from one member state to another.

The remaining related articles deal with state monopolies, dumping practices, and the like.

The problem of harmonizing the treaty provisions with the legal systems governing restrictive practices in the member countries is a major one. Article 100 of the treaty provides for directives on harmonization of laws. However, this does not answer the problems of whether the Common Market law on restrictive practices will be federal in nature and the laws of the member states will continue as State law. There is every likelihood that a dual legal system will exist and control of restrictive business practices that are purely domestic within a member state will not fall under the ban of the treaty. Assuming that this problem is somehow resolved, there is the further practical question of whether a stronger federal law on restrictive practices can coexist in the Common Market with the weaker laws of the member states. Belgium and Luxembourg have no legislation controlling restrictive practices, though Belgium is considering such legislation.¹⁰⁴ Italy has a Mussolini law which it ignores and hopes to replace soon.¹⁰⁵ The Netherlands has a registration law that includes the power to order compulsory cartellization.¹⁰⁶ The new German law is a registration law, but it appears to be very broad and entirely dependent on whims of administration as to the degree of its suppression of restrictive practices.¹⁰⁷ The position of France has been discussed. If the Common Market has a Free Trade area added to it, then there will be such conflicts as the legalization of nonsigners' clauses for resale price maintenance in the British legislation¹⁰⁸ as against the French ban. Such a conflict already exists between the French and German legislation.¹⁰⁹

The problems of the Common Market are practical rather than legal. A Common Market must be able to develop in the face of existing cartels of great strength such as exist in the Netherlands

¹⁰⁴ Authority for this prediction is found in an unpublished manuscript by Dr. P. M. Raskin, Director of Professional Organizations and Economic Disputes of the Belgian Ministry of Economic Affairs, International Conference on Restrictive Business Practices, Chicago, Jan. 15, 1958, pp. 3-4.

¹⁰⁵ Codice Civile arts. 2595-2620 (Italy 1949).

¹⁰⁶ Discussion of the Economic Competition Act of 1956, unpublished manuscript by Dr. P. Verloren van Themaat, Director of Office of Industrial Organization Problems, Netherlands Ministry of Economic Affairs, International Conference on Restrictive Business Practices, Chicago, Jan. 15, 1958, p. 12.

¹⁰⁷ For an English language version, see *Wirtschaft und Wettbewerb, Dokumentation V. No. 1, 1958*. Sections 2-7 provide for wide discretion in the Cartel Authority. Section 8 gives the Federal Minister of Economics the power to authorize any sort of cartel if necessary for the common good.

¹⁰⁸ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 25.

¹⁰⁹ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 16. Section 17 of the act provides for cancellation of the previously registered automatic authorization if there is misuse of the price-fixing right.

and, despite the self-centered concentrations, such as exist in the Italian, French, and German automobile industries.¹¹⁰ Then, if indeed a Common Market comes into being with no geographic allocations to common sales agencies such as have been legalized in the Coal and Steel Community,¹¹¹ there may be a possibility for implementing the language of articles 85 and 86.

V. THE ENFORCEMENT RECORD

A. *The Coal and Steel Community*

An apocryphal story is told by the Community's lawyers of the very first day of the Community's existence when Jean Monnet, the first President, called in his attorneys and said, "Which cartels will we begin to break up this week?" If the story is not true, it nevertheless represents the spirit of the High Authority. However, it fails to reflect the very difficult problems with which the Community is and has been faced. Probably no other industry has been as heavily dominated by national and international cartels as has steel.¹¹² Coal represents a long-established system of cartels, sales agencies, and government agencies controlling either import or export, or both.¹¹³ It is against this background of national and inter-

¹¹⁰ For a pessimistic discussion of the potential of articles 85 and 86, see Francois Perroux, *Les Formes de la Concurrence dans le Marche Commun*, *Revue d'Economie Politique*, Jan.-Feb. 1958, Paris, p. 340 et seq. Compare the anxiety expressed by The International Chamber of Commerce which has urged a delay in the implementation of articles 85 and 86. The Chamber considers these articles to be "discriminatory" against existing agreements. Apparently, the Chamber believes that article 88, binding Member States to implement articles 85 and 86, will be invoked. One may ask why the Chamber seems surprised by treaty provisions known for the past several years. See article entitled "Six Nation Market Urged to Delay Anti-Trust Rulings," *N.Y. Times*, April 1, 1957.

¹¹¹ The High Authority has allowed exemptions from the operation of article 65 for common sales agencies such as those of the Ruhr. There, three agencies, as a result of a number of decisions and a judgment of the court, have been given sales zones. The court, in Matter 2-56, between the Ruhr Common Sales Agency (Geitling) and the High Authority, *Journal Officiel*, April 16, 1957, p. 166/57 et seq., found that the High Authority was obligated to pass upon the sales agency under the provisions of article 65, and that without authorization from the High Authority the agency would be in violation of the article. Moreover, the court found that the High Authority, by defining a wholesaler as one who had purchased 12,500 tons of coal from one of the other agencies and like amount from "Geitling," was creating a cartel. The definition was stricken. By a series of subsequent High Authority decisions, the schemes of operation for the three common sales agencies in the Ruhr were modified. These modifications include the allocation of geographic sales areas. The decisions involved are: 10-57, 11-57, and 12-57, April 1, 1957, *Journal Officiel*, April 16, 1957, pp. 159/57-163/57; 16-57, 17-57, and 18-57, July 26, 1957, *Journal Officiel*, Aug. 10, 1957, pp. 319/57-352/57; and 24-57, and 26-57, Dec. 10, 1957, *Journal Officiel*, Dec. 27, 1957, pp. 629/57-635/57. Similar sales zones and similar sales agencies have been authorized.

¹¹² For an exhaustive analysis, see Rieben, *Des Ententes de Maitres de Forges*, au Plan Schuman 81-89, 103-45, 215-313, 475-82, 493, 528 (Lausanne) (1954).

¹¹³ Expose de M. Rene Mayer, President de la Haute Autorite sur l'Activite de la Communauté, *Assemblée Commune, Session Ordinaire, 1955-1956* (Straasbourg), May 8, 1956, Publication 1754/2/56/1, pp. 29-33.

national cartels as well as relatively great concentrations that the High Authority began its work.¹¹⁴

Because American interests in the Community's enterprises are practically nonexistent, little more than a summary of some of the highlights and attitudes will be attempted. They may serve as a guide to possible future results in the Common Market.

Generally, it is believed that the anti-cartel policy is leading to increased concentration in the Community. The facts on concentration are not easily obtained because of the policy of the High Authority to keep secret its rulings under article 66 as a means of preventing speculation in the stock market.¹¹⁵ The Common Assembly of the Community, much to the surprise of many who thought it would be a political arena, has shown much interest in both the problems of cartels and concentration to an extent that might even annoy the High Authority.¹¹⁶ In this connection, one of the Assembly's committees has issued a report on concentration and has asked that the High Authority keep it informed of developments.¹¹⁷

The Coal and Steel Community believes that concentration in the Community can only be measured by a comparison with the United States or the United Kingdom. On that basis, which assumes that the purchasing power of the 160 million inhabitants of the Community may be equated to that of the population of the United States, it is found that the largest steel enterprise in the Community is smaller than each of the eight largest American enterprises, with an annual production one tenth of that of the United States Steel Corp. The comparisons omit the fact that total United States production is almost three times greater than Community production.

As of a year ago, the High Authority had investigated 94 concentrations, 51 because of its study of market conditions and 43 on the basis of requests for authorization. Twenty authorizations were granted, of which 16 were requested. Of the remainder, 3 were permitted conditionally after the payment of fines, 8 antedated the treaty, 2 needed no authorization, and 15 did not even involve anti-

¹¹⁴ See Rieben, *op. cit.* supra note 112.

¹¹⁵ High Authority Information Documents, No. 2, *The High Authority and The Trusts* (Luxembourg), Sept. 1, 1955, pp. 5, 7.

¹¹⁶ E.g., questions relating to cartels and concentration posed by M. Michel Debre, member of the Common Assembly, and replies from the High Authority in which one may detect a note of asperity. *Official Gazette*, May 11, 1955, pp. 179-81, Nov. 16, 1956, p. 350, Dec. 27, 1956, pp. 401-02.

¹¹⁷ *Assemblée Commune, Exercice 1956-1957, Session Ordinaire, Rapport, Fait au Nom de la Commission du Marche Commun sur les Concentrations d'Enterprises dans la Communauté*, Document No. 26, May 1957, pp. 14-16, 19; *Annexe I*, p. 34; *Annexe III*, p. 40; *Annexe IV*, p. 41.

cle 66 of the treaty. The balance of 46 were still being studied. In other words, no authorization has been withheld.¹¹⁸

In the area of cartels the picture is somewhat different. Of the 63 cartels that registered, 32 did not come under the provisions of article 65 of the treaty, and 4 cartels liquidated voluntarily before a decision was reached.¹¹⁹

In general, it can be said that the Community began by breaking up some national scrap-buying cartels.¹²⁰ These would probably have gone because of the scrap shortage problems and the need for equal treatment and access to scrap in the Common Market. Subsequently, the Community began to authorize specialization agreements and joint sales agencies in the production of steel and joint sales agencies for various types of fuel.¹²¹ The great Ruhr coal sales agency was divided into three units, and action was taken against other sales and import agencies involving coal.¹²² On the other hand, zone pricing schemes and other arrangements involving price have been legalized.¹²³ By our standards this may not appear to be an earth-shaking record. There is, however, another side to the picture which may indicate that the Community has shown great strength in taking anti-cartel action against governments and some of the major coal cartels.

It is difficult to overestimate the magnitude of the problem with which the Community is faced. Underlying the apparent "go slow" policy is a real fear that was expressed in the summer of 1956 by some of the officials of the High Authority. They said, "Suppose we do break up the cartels. At present with a seller's market for steel we would be under only a little criticism. However, there is a likelihood that in the next several years things will change. When that

¹¹⁸ *Ibid.*

¹¹⁹ High Authority Information Documents, No. 2, The High Authority and The Trusts (Luxembourg), Sept. 1, 1955, p. 7. Report on the Situation of the Community laid before the Extraordinary Session of the Common Assembly (Luxembourg), Nov. 1954, p. 96.

¹²⁰ *Id.* at 7-8. The national importing cartels were succeeded by a single cartel under an authorized exemption under article 65. In part, the United States' export restrictions on scrap made this necessary. In 1955, the United States questioned the exclusive arrangement between the cartel and a United States exporter. The High Authority ordered the termination of this restrictive practice, while continuing to authorize the scrap import cartel. See Dep't of State Press Release No. 381, June 21, 1957, pp. 5-7, 15-17.

¹²¹ E.g., Decisions 11/56, March 7, 1956, Official Gazette, March 29, 1956, p. 121; see note 111 *supra*, Decisions 31/54, 32/54, 33/54, and 34/54, June 25, 1954, Journal Officiel, July 6, 1954; Decisions 40/54 and 41/54, July 29, 1954, Journal Officiel, Aug. 1, 1954.

¹²² See note 111 *supra*; Quatrieme Rapport General sur l'Activite de la Communaute, April 11, 1955-April 8, 1956 (Luxembourg), April 8, 1956, Document No. 1743/2-56/1, pp. 139-54.

¹²³ E.g., Decisions 16/56, 17/56, 18/56, 19/56, 20/56, and 21/56, March 25, 1956, Official Gazette, March 29, 1956.

happens our anti-cartel program will be blamed for the recession. Possibly, we need a recession with cartels operating as an example, and then we can proceed." The opportunity may be at hand.

B. *The Netherlands*

In 1927, it was still possible to say that no cartels existed in the Netherlands.¹²⁴ Netherlands' cartel legislation began in 1935,¹²⁵ and the present form is embodied in the Economic Competition Act of 1956.¹²⁶ It is registration legislation which empowers the government to make cartelization compulsory or to dissolve cartels. The number of nationwide registered cartels increased from 450 in 1950 to 850 in 1956. These included 50 production cartels, 180 market quota arrangements, more than 500 price agreements, 250 agreements dealing with other conditions of sale, 100 exclusive-dealing agreements, and 90 central purchasing or sales agencies. In addition, some 1,000 cartels of less than nationwide scope were registered. Since 1956, there has been no increase in registration, which may well be due to the new policies embodied in the current legislation which seem stricter than before. However, the 1956 act is not yet operative because of the lack of supplementary legislation dealing with the right to appeal to an independent court.¹²⁷ For that reason the cases to be examined, beginning in 1950, will be under the Cartel Decree of November 5, 1941, as amended.¹²⁸ It would seem fair to assume that when the new act comes into force, the treatment of restrictive business practices will be even more strict than before.

Among the practices which have been prohibited are boycotts of organizations such as co-operatives, but the cartel arrangements were otherwise permitted to stand, thus requiring the co-operatives to join if they wished to obtain the goods.¹²⁹ Boycott of department stores has been similarly treated on the theory that the public interest is not served by preventing the normal exercise of commercial functions.¹³⁰ In some cases, adherence to the cartel as a prerequisite to engaging in a particular trade has been forbidden and a fixed price scheme whereby all prices were made proportionate to a maximum

¹²⁴ Van Themaat, *op. cit.* supra note 106, at 3.

¹²⁵ Law of May 24, 1935, Law on the Statutory Application of Industrial Agreements to Non-Participants. The French text is to be found in Notes et Etudes Documentaires, No. 1681 (Paris), Nov. 21, 1952, pp. 14-15.

¹²⁶ For an English language version of the text as proposed, see U.N. EcoSoc Council Off. Rec. 19th Sess., Supp. No. 3, at 53-57 (E/2671) (1954).

¹²⁷ Van Themaat, *op. cit.* supra note 106, at 3.

¹²⁸ For an English language version, see Restrictive Business Practices, U.N. EcoSoc Council Off. Rec. 16th Sess., Supp. No. 11B, at 143-46 (E/2379/add. 2) (1953).

¹²⁹ Heater and Furnace Cartel-Nederlandse Staatscourant, No. 60, 1950.

¹³⁰ Bookdealers Cartel-Nederlandse Staatscourant, No. 225, 1950.

markup was banned.¹³¹ Restrictions on the liberty of dealers have been banned where they lacked precision and where violations resulted in severe punishment by the cartel. Only public and specific restrictions were allowed.¹³² Price fixing, which includes a wholesale markup in industries where sales are direct from manufacturer to retailer, has also been banned.¹³³ Finally, restriction designed to prevent consumers of materials from pooling their purchases have been prohibited.¹³⁴

Several more recent cases will be examined in some detail. A request for a legalized market-sharing arrangement for milk distribution in Amsterdam was permitted under specific conditions. In that city of one million inhabitants there were one thousand milk distributors. In some two hundred other markets, where market-sharing arrangements existed, it was found that the price of milk was approximately twenty per cent cheaper, but service to the consumer was poor. In order to ensure both a fair price and good service, a market-sharing agreement was authorized on the condition that each consumer have at least three distributors from whom to choose for service. The indications are that the arrangement has led to the desired result.¹³⁵

Where the interests of the Netherlands are concerned, the Dutch are not unwilling to battle a cartel of international scope. The Dutch government has encouraged the building of a soda ash plant in the northern area, despite the fact that Solvay of Belgium, through cartel arrangements, has practical Europe-wide control. Holland had previously depended on foreign sources for this vital material.¹³⁶

Probably the most spectacular recent action has dealt with the radio cartel. On March 15, 1955, the Minister of Economic Affairs and the Minister for Government Industrial Organizations suspended the cartel arrangements between the Central Bureau to Protect the Interests of Radio Traders (Cebubera), the Netherlands Association of Radio Wholesalers (NORG), and the Netherlands Association of Radio Retailers (NVRD).

These arrangements required manufacturers and importers of radios to establish gross selling prices for their radios or net purchasing prices for traders. The members of Cebubera were required to

¹³¹ Medical Instruments Cartel-Nederlandse Staatscourant, No. 31, 1952, No. 148, 1952.

¹³² Cycle and Automobile Cartel-Nederlandse Staatscourant, No. 150, 1950.

¹³³ Beer and Mineral Water Cartel-Nederlandse Staatscourant, No. 156, 1952.

¹³⁴ Flour Millers Cartel where the attempt was to prevent bakers from jointly purchasing, Nederlandse Staatscourant, No. 18, 1952.

¹³⁵ Van Themaat, *op. cit.* supra note 106, at 9-10.

¹³⁶ Article entitled "Dutch Plans Stir Soda Ash Cartel," N.Y. Times, May 1, 1954.

sell radios under recognized (as distinguished from private) brands, they could not sell on consignment, could not organize trade-in campaigns, and could not deliver directly to consumers. NORG members were subject to the ban on consignment selling as well as a prohibition on finance plans and direct sales to consumers. The NVRD members had even more strict and, in some cases, unusual restrictions. They included prohibition of making radios, taking back an old radio without selling a new one, selling to fellow members, opening a branch store or showroom, and selling radios in the open market. There were also the following obligations: to adhere to specified trade-in rules including price fixing on sales of used sets; to keep secret the trade-in prices; to give no other service or guarantee than that provided by the manufacturer; to sell no more than two radios per season to the same consumer and his family; and to finance credit sales at the highest legal rate of interest. These practices were found to have increased the selling mark-ups from 33 per cent to a level between 42 and 50 per cent. In the case of certain models the profit at retail had been 100 per cent of wholesale prices. Manufacturers and importers were found to have been at the mercy of the dealers as a result of these practices.¹³⁷

¹³⁷ Nederlandse Staatscourant, March 15, 1955, after listing the practices enumerated in the text, the suspension order states:

Considering that these regulations have brought about exclusive trade between radio manufacturers, importers, wholesalers and retailers;

Considering that these agreements and regulations are cartels in the sense of the Cartel Decree of 1941;

Considering that the greater part of radio trade is bound by them;

Considering that this has contributed to an almost complete absence of price competition;

that the rigid fixing of retail selling prices has forced manufacturers and importers to bid for the favor of the traders;

that as a result the maximum discounts on the selling price when buying the largest possible quantities in retail trade have increased from 33 percent (3 percent purchase tax included) in 1950 to 42-50 percent in 1954;

that often special discounts were given, for special reasons, e.g. old models or demonstration radios, as a result of which profits of 50 percent of selling prices, i.e. 100 percent of wholesale prices often have been made in the retail business;

that this is the more undesirable because radios are rather high priced articles which nonetheless belong to the essential needs of every family;

that the mechanism of competition has worked badly in this sector;

that the previous maximum discounts of 30 percent (3 percent purchase tax excluded) are assumed to be adequate;

Considering that there are reasons to consider declaring unenforceable the agreements between Cebubera, NORG and NVRD, the regulations of these organizations and the agreements between their members;

that these agreements and regulations, which (a) deal directly or indirectly with the fixation by manufacturers and importers of consumer prices or purchasing prices and mark-ups and their enforcement or (b) aim to bolster up these prices, especially by exclusive trade, are unacceptable because they have created, supported and kept up prices and mark-ups which are far too high and therefore contrary to the general interest;

By an order of January 20, 1956, the suspension was replaced by a permanent decree enjoining collective maintenance of sales prices, the exclusive dealing arrangements, and the mandatory provisions on gross price. In explaining the reasons for the action, the Minister pointed to the hiring of agents provocateurs for enforcement and the restriction on individual liberty.¹³⁸

The interest of American business in Holland is growing. In the area of wholly owned subsidiaries alone, there was an increase of

that the Cartel Commission has been asked for advice on these agreements and regulations;

that because of the serious disadvantages, also in view of the present wage and price policy and the fact that the pertinent goods are brought by virtually every family, there are important reasons to take immediate measures; that these reasons justify suspension of the pertinent cartel;

that at this moment it is not justified to prohibit vertical price fixation between a supplier and his customers;

by virtue of the Cartel Suspending Act (Statute Book 1951, 107);

DECIDES:

1. The aforementioned regulations are suspended, except those on vertical price fixation in individual contracts between a supplier and his customers. Excluded from this exception are the stipulations in said contracts which do not directly fix the consumer price of the goods covered by the contract.

2. This decision becomes effective on the third day after it has been published in the Netherlands Official Gazette.

The Minister of Economic Affairs,
J. Zijlstra

¹³⁸ Nederlandse Staatscourant, Jan. 20, 1956. The decree reads as follows:

The following stipulations of the cartel arrangements are declared nul [sic] and void, so far as they refer to the trade in radio articles or radio contract articles:

1. the stipulations aiming at collective maintenance of sales prices in the second or third hand fixed by manufacturers or importers.
2. the stipulation in regard to exclusive economic intercourse.
3. the stipulations in regard to mandatory fixation of gross sales prices.

A summary of the exposition of motives for the decree follows:

The Minister was cognizant of the fact that the CEBUBERA (Central Bureau for the Protection of the Radio Trade), NORG (Netherlands Radio Wholesalers Organization), and NVRD (Netherlands Association of Radio Retailers) had made mandatory regulations for their members, which regulations should fall under the operation of the Cartel Decree of 1941. This complex of regulations was considered to be extraordinarily stringent and supported by an effective system of exclusive economic intercourse. It included the obligation for the members of the CEBUBERA to fix gross consumer prices, which were enforced by a strict system of investigating, prosecuting and judging violators.

Although it should be acknowledged that in view of previous chaotic conditions in the trade, such arrangements exercised a constructive influence in the prewar period, the gradual extension of the system resulted in a growing rigidity in the wholesale and retail price structure. This should be considered detrimental to the public interest, the more so as fear for return of the prewar chaotic conditions is unjustified.

Generally applied individual vertical price agreements always carry with them a certain element of price rigidity, but systematic enforcement of price agreements intensifies this rigidity. This condition has hampered development of varying distribution methods, has created injustice to individual entrepreneurs, has limited individual business liberty, and has led to competition between manufacturers and importers resulting in excessive retail profit margins and prices. This enforcement machinery finally included a system of agents provocateurs over dealers. The methods used have thus condemned themselves.

Therefore, the collective price maintenance system is considered to be contrary to public interest. Mandatory regulations would only be acceptable if they were instituted to resist abuses. The radio retail trade is already protected against too large admit-

twenty-two from 1947 to 1953.¹³⁹ On the basis of the past cases and the new act, certain observations may be made. Restrictive arrangements which take the form of rationalization cartels will be permitted, and obligatory adherence by those wishing to participate in that branch of trade or industry will be countenanced. In order to qualify, these arrangements must demonstrate a restraining influence on price and more efficient distribution. All of this is, of course, subject to the actual interpretation of the rules of the Common Market. Boycotts and harsh private penalties for infractions of cartel regulations will probably not be countenanced. Resale price maintenance and price discrimination when not hedged with arrangements leading to unfair prices will also be permitted as long as there is some indication of concern for the public interest.

C. Germany

The German legislation became effective on January 1, 1958,¹⁴⁰ and it has not yet been possible to obtain official copies of rulings. However, on January 13, 1958, at Chicago, a German attorney who was a member of Parliament was able to speak of the authorization granted to a rationalization cartel.¹⁴¹ This cartel provides a common selling agency for manufacturers of sewer pipe. The argument, apparently accepted by the Cartel Authority, was that several hundred sizes of pipe were necessary to supply the needs of various communities. Scheduling of production and ease in placing orders were successfully advanced as reasons for allowing the cartel.

D. Norway

The trend in Norwegian enforcement is indicated in the earlier discussion of legislation, particularly with reference to the new ban on resale price maintenance. Among the best documented cartel actions is one dating back to 1927 and dealing with breweries. One major feature of that cartel agreement was the limitation on the

tance of new dealers by the Settlement Decree for Electrotechnical Trades of 1949. At present manufacturers and wholesalers are prevented individually from fixing prices at such a level as they, for their particular business, consider most desirable. They also lack the liberty under the existing cartel to abstain from the agreement if they do not agree with strict price control. These aspects are also considered to be contrary to the public welfare.

Therefore, the Minister has decided to convert his suspension of March 1955 into a permanent dissolution.

The officers of the Ministry's Economic Control Service will execute the new decree and, if necessary, utilize judicial procedures.

¹³⁹ Netherlands Industrial Institute Press Release (New York) Nov. 1953.

¹⁴⁰ See *Wirtschaft und Wettbewerb*, op. cit. supra note 107, § 109(1). For a full analysis of the legislation, see Kronstein, *Cartels Under the New German Cartel Statute*, 11 Vand. L. Rev. 271 (1958).

¹⁴¹ Id. § 5.

sale of beer brewed in Oslo in other areas having a brewery. The Oslo breweries were found to be more efficient than those elsewhere. Therefore, it was ordered that the restriction be dissolved so as to bring down the price of beer.¹⁴³

Norway also has a tradition of prohibiting arrangements that restrict freedom of entry.¹⁴³ Arrangements involving tying clauses are generally stricken.¹⁴⁴

Under the present complex of Norwegian legislation which deals with prices, profits, and dividends, it is fair to assume that any arrangement that domestically could adversely affect free pricing or which could lead to higher prices will be prohibited.

E. Japan

The Japanese legislation is a combination of a registration law and a Commission of Enquiry, utilizing some concepts of American antitrust law and some features more common to the European experience. Cartels may be legalized, as may resale price maintenance, all as exceptions to general provisions against restraints of trade. The major agency concerned is the Fair Trade Commission. The first version of law was born of the occupation, but when that terminated, the wider legalization of restrictive practices became lawful by amendments.¹⁴⁵

The administration of the law has been for the most part consistent with the principle that most restrictions are bad.¹⁴⁶ Among the agreements that have been stricken down are: (1) agreement between banks fixing interest rates on loans and deposits;¹⁴⁷ (2) agreement between plywood manufacturers leading to identical bidding;¹⁴⁸ (3) agreements between motion picture producers and ex-

¹⁴³ *Supra* note 27, at 58-65. The cartel was created in 1901 and first reported in 1920. A subsequent agreement was negotiated in 1931 designed to run until 2030, and this also became subject to governmental modification.

¹⁴⁴ Bookdealers Association, *Trustkontrollen*, No. 5, 1935. Note, however, that similar limitations, particularly when overall control of the import of an important commodity are involved, may be permitted. E.g., Tobacco Manufacturer's Federation, see Report of the Ministry of Finance, *The Price Act*, Enclosure No. 1 to Oslo, Dispatch No. 786, June 3, 1954, p. 68.

¹⁴⁵ *Radio Cartel*, *Trustkontrollen*, No. 2, 1936.

¹⁴⁶ See *Control of Restrictive Trade Practices in Japan*, Restrictive Trade Practices Specialists Study Team, Japan Productivity Center, Tokyo, 1958, pp. 3-20.

¹⁴⁷ During the first ten years, the Fair Trade Commission served more than 150 notices of violations. Forty-five were contested, of which 11 were dismissed. Eight decisions have been appealed to the Tokyo Higher Court, and in the 7 decisions reported to date, the FTC has generally been upheld. However, the court has found that unreasonable restraint of trade does not include vertical combinations and that members of a trade association are not personally liable. On both of these issues, the views of the FTC were thereby stricken down. See *Control of Restrictive Trade Practices in Japan*, Restrictive Trade Practices Specialists Study Team, Japan Productivity Center, Tokyo, 1958, p. 16.

¹⁴⁸ Decision, Dec. 22, 1947, *id.* at 112.

¹⁴⁹ Decision, Aug. 30, 1949, *id.* at 123.

hibitors forbidding double features, setting admission prices, and establishing block booking;¹⁴⁹ (4) agreement between an electric railway and bus company to regulate service, so as not to compete;¹⁵⁰ (5) agreement fixing silk export prices;¹⁵¹ (6) arrangement between bank and silk manufacturer controlling eleven silk manufacturers by loans so as to fix price;¹⁵² (7) agreement for territorial allocations in the sale of coke;¹⁵³ (8) agreement setting the wholesale price of cosmetics;¹⁵⁴ (9) conspiracy to fix prices on petroleum products;¹⁵⁵ and (10) arrangement to control dairy prices by control over loans for purchase of stock coupled with a requirement that output be sold to certain dairies.¹⁵⁶

There can be little doubt that as to many aspects of the domestic economy the enforcement has been on a strict basis. Yet, there is every evidence that the weakening of the law since 1947 has been a response to increasing restrictions imposed on Japanese exports in other parts of the world. As the impact of such restriction creates more imbalance in the home market, it is likely that greater utilization will be made of the general language which does permit restrictive agreements and cartels. Certainly, such a trend already exists in the export area.¹⁵⁷

Of the greatest interest to American businessmen is the law governing licensing arrangements. As it has become more difficult to operate subsidiaries in Japan, the licensing device has increased in popularity. International licenses with restrictions on exchanges of technical knowledge and other forms of restrictions are no longer forbidden.¹⁵⁸

F. Ireland

Thus far, the Fair Trade Commission has held five public enquiries. The items concerned were the following: supply and distribution of radios and accessories;¹⁵⁹ building materials and components;¹⁶⁰

¹⁴⁹ Decision, May 13, 1948; Decision, July 16, 1949, id. at 131, 137.

¹⁵⁰ Decision, May 2, 1950, id. at 142.

¹⁵¹ Decision, May 12, 1950, id. at 145.

¹⁵² Decision, July 13, 1950, id. at 148.

¹⁵³ Decision, Sept. 26, 1950, id. at 153.

¹⁵⁴ Decision, March 15, 1951, id. at 169.

¹⁵⁵ Note that Standard Vacuum Oil Company was the only one of the companies charged that was found not to have violated the law. The FTC decision was affirmed by the Tokyo High Court on November 9, 1956. Decision, Feb. 20, 1953, id. at 176.

¹⁵⁶ Recommendation and Proposed Order, Feb. 2, 1957, id. at 190.

¹⁵⁷ Id. at 18-19.

¹⁵⁸ Id. at 8.

¹⁵⁹ Fair Trade Commission, Report of Enquiry Into the Conditions Which Obtain in Regard to the Supply and Distribution of Radio Sets and Accessories. Restrictive Trade Practices (Radios) Order, 1955 (S. 1 No. 102 of 1955). Restrictive Trade Practices (Confirmation of Order) Act, 1956. This and subsequently cited Irish publications may be obtained from the Government Publications Sales Offices, G.P.O. Arcade, Dublin.

¹⁶⁰ Fair Trade Commission, Report of Enquiry in Relation to the Supply and Dis-

medicines, infant foods, and toilet preparations;¹⁶¹ motor cars;¹⁶² and groceries and provisions.¹⁶³ The commodities were chosen in view of the legislative emphasis on supply and distribution so as to cover the broadest possible areas of trade.

The recommendation and orders have been made on the basis of certain fundamental objectives such as insuring freedom of entry, equity in providing supplies, and freedom of pricing for manufacturer and trader. Thus, trade association powers limiting freedom of entry have been abolished, and entry is dependent on the terms and conditions of individual suppliers. Horizontal price fixing and market-sharing arrangements have been condemned, and, in most cases, resale price maintenance has been condemned whether enforcement is collective or by an individual. However, to prevent price cutting of an extreme nature, suppliers have been empowered to withhold supplies from those selling below the price paid for the item. On the other hand, the Commission has refused to work out a minimum price scheme tied to cost because of the danger of collective price or margin fixing.¹⁶⁴

The small size of the Irish economy, as is also true in Norway, has made the Commission very conscious of price problems and the question of freedom of entry which, in a small market, is complicated by the relatively few competing products available. It would seem that all sorts of production agreements involving restrictions and similar licensing agreements would be legal for American interests as long as they in no way inhibited the supply of goods, including the importation of products and the development of low prices. Agreements that can avoid such pitfalls will be safe as long as the European Free Trade Area does not become a reality and bring with it possible further prohibitions such as those applicable in the Common Market.

tribution of Building Materials and Components. Restrictive Trade Practices (Building Materials) Order, 1955 (S. 1 No. 187 of 1955). Restrictive Trade Practices (Confirmation of Order) (No. 2) Act, 1956.

¹⁶¹ Walsh, *op. cit.* *supra* note 52, at 9.

¹⁶² Fair Trade Commission, Report of Enquiry Into the Conditions Which Obtain in Regard to the Supply and Distribution of Motor Vehicles, Tires, Other Spare Parts and Accessories. Restrictive Trade Practices (Motor Cars) Order, 1956 (S. 1 No. 86 of 1956).

¹⁶³ Walsh, *op. cit.* *supra* note 52, at 9.

¹⁶⁴ See notes 159-63 *supra*. In addition, see the Fair Trade Commission, Annual Reports. These have been issued since 1953 and contain information concerning the establishment of fair-trading rules. Among the commodities for which such rules have been issued are ropes, cordage, and twine; nails and screws; earthenware and china tableware; cutlery, spoons, and forks; petrol; electric light bulbs; sole leather; files and hacksaw blades; dry batteries; carpets and rugs; nonwoolen household textiles; coal; and aluminum hollowware.

G. United Kingdom

The Restrictive Practices Act dates from August 2, 1956,¹⁶⁵ and succeeds and amends earlier enactments involving the enquiry technique.¹⁶⁶ Monopolies, parent-subsidiary agreements, export agreements, exclusive-dealing contracts between two parties, and know-how agreements are outside of the general scope of the act, as are patent-licensing agreements.¹⁶⁷ Agreements subject to registration are, with few exceptions, to be made public,¹⁶⁸ and this is further evidence of the already noted trend toward more publicity in the field of restrictive practices. Export agreements are to be registered with the Board of Trade and are not public.¹⁶⁹ As of January 1958, 1,850 agreements had been submitted for registration, of which 1,550 had been screened sufficiently to permit their placement on the public register.¹⁷⁰ There is evidence that the public registration requirement, as hoped, has led to the modification or abandonment of many restrictions.¹⁷¹

On order of the Board of Trade,¹⁷² the Registrar of Agreements takes agreements to be examined before a special tribunal which determines to what extent the restrictions are consistent with the public interest.¹⁷³ The act provides for seven basic defenses on which parties to a restrictive agreement may rely: (1) the restriction protects users against physical injury; (2) without the restriction users would lose a substantial benefit; (3) the restriction counteracts anti-

¹⁶⁵ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68.

¹⁶⁶ Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66; Monopolies and Restrictive Practices Commission Act, 1953, 1 & 2 Eliz. 2, c. 51.

¹⁶⁷ Monopolies of scale are now the concern of the reconstituted Monopolies and Restrictive Practices Commission, Monopolies and Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, amending the 1948 and 1953 acts cited *supra* note 166. For corporate subsidiaries, see Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 8(9). Note that § 154 of the Companies Act, 1948, 11 & 12 Geo. 6, c. 38, treats a company owned in equal proportions by two other companies as an independent company. Export agreements are treated in Part III of the 1956 act and in § 8(8); exclusive dealing, § 8(3); know-how agreements, § 8(5); and patent licensing agreements, § 8(4).

¹⁶⁸ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 11(4).

¹⁶⁹ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 31(1).

¹⁷⁰ See unpublished manuscript by Rupert L. Sich, C.B., Registrar of Restrictive Trading Agreements, International Conference on Restrictive Business Practices, Chicago, Jan. 1958.

¹⁷¹ Mr. Peter Thorneycroft, President of the Board of Trade, on the Order for the Second Reading of the Bill, said in regard to registrations: "Industries at this very moment are looking at their arrangements very closely. They are deciding what they are going to keep, and in consequence publicly register. . . . It is my hope and belief that quite a number of devices which may have been appropriate 25 or 30 years ago may now be quietly dropped." Hansard, March 6, 1956, Col. 1942. Mr. Sich, *op. cit. supra* note 170, at 10, believes that about one third of the registered agreements were modified (made less restrictive) before registration.

¹⁷² Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 1(2).

¹⁷³ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, §§ 2-5, 20-22.

competitive acts by a third party not involved in the agreement; (4) the restriction is necessary to balance the power of a supplier who holds a monopoly or dominant position in the market; (5) the restriction will prevent unemployment; (6) the restriction prevents a reduction in export trade; and (7) the restriction is necessary to the maintenance of other restrictions which are deemed in themselves to be legal.¹⁷⁴ No decisions have as yet come down from the Restrictive Practices Court. It is expected that approximately 200 agreements involving forty products will shortly be scrutinized and that *stare decisis* will lead to the nullification or modification of other agreements similar to those found by the tribunal to be against the public interest.¹⁷⁵

However, two cases have recently been decided interpreting the effect of the act in two respects. *Re Austin Motor Co. Agreements*¹⁷⁶ is authority for the proposition that the substitution of bilateral exclusive-dealing agreements for multilateral agreements, which would have been registrable, where the bilateral agreements together have the same substance as the multilateral agreements, does not subject the bilateral agreements to registration. *County Laboratories, Ltd. v. J. Mindel, Ltd.*¹⁷⁷ supports the proposition that actual notice of a resale price maintenance scheme must be given to a dealer before he is bound. Thus, it would seem likely that notice through a statement in a trade publication would not be sufficient. Express knowledge of the price restriction must be shown.

There is some indication that the ban on enforcement of resale price maintenance by collective action of a trade association or the like¹⁷⁸ has already created difficulties in the enforcement of price fixing by individual suppliers similar to that experienced in the United States. Some retailers have begun to suggest collective action against those who have abandoned resale price maintenance,¹⁷⁹ a practice which is registrable and illegal under the act.¹⁸⁰

American firms doing business in the United Kingdom through

¹⁷⁴ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 21.

¹⁷⁵ *Sich*, op. cit. supra note 170, at 11, 17. More than twenty-five per cent of the parties notified that an agreement will be taken before the court have cancelled the agreements or the restrictions.

¹⁷⁶ [1957] 3 All E.R. 62 (Ch.). The bilateral agreements, as exclusive dealing agreements, come under § 8(3) of the act.

¹⁷⁷ [1957] 1 All E.R. 806 (Ch.); id. at 861.

¹⁷⁸ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 25.

¹⁷⁹ *West*, Price Maintenance in the U.K., *Cartel*, Vol. 7, No. 3 (London), July 1957, p. 79 et seq. For an opinion that the ban on collective enforcement of resale price maintenance will not lessen price fixing, see *Tresise*, The U.K. Restrictive Practices Act, *Cartel*, Vol. 7, No. 4 (London), Oct. 1957, pp. 110, 115.

¹⁸⁰ Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, §§ 6(1)(b), 24(2).

subsidiaries or by licensing agreements are free from public scrutiny of their arrangements as long as the licensee or subsidiary does not join some association or agreement requiring registration. Once there is an attempt to engage in restrictive practices beyond the primary relationship, there is danger that the publicity attendant to the restrictions might well supply leads to our own Department of Justice.

H. Sweden

The currently applicable Swedish legislation¹⁸¹ forbids, without administrative permission, resale price maintenance and collusive tendering of bids on public projects.¹⁸² Restrictive agreements are to be registered¹⁸³ and the Cartel Office is to conduct investigations into competitive restrictions.¹⁸⁴ Uniquely, the Swedish system does not empower the authorities to change or modify restrictive agreements. At the most, the power is given to the Freedom of Commerce Board to negotiate for changes,¹⁸⁵ and in the rare instance where negotiations dealing with restrictions of major importance causing abnormally high prices fail, the King (government) may for no more than one year set a maximum price.¹⁸⁶

Negotiations may not touch restrictions affecting competition outside Sweden without the King's permission. This permission may be granted only to the extent Sweden has international obligations requiring such activity.¹⁸⁷

The cornerstones of the Swedish system are publicity¹⁸⁸ and belief in reasonable self-regulation. This had led to the development of a private decartelization bureau in the Federation of Swedish Indus-

¹⁸¹ The author is indebted to Dr. Hans B. Thorell, op. cit. supra note 25, for an English translation of the following laws and regulations: Public Law to Counteract Restrictions on Competition in Business in Certain Instances, Law of Sept. 25, 1953, amended, June 1, 1956, amendments becoming effective Jan. 1, 1957; Public Law Concerning the Obligation to Submit Information as to Conditions of Price and Competition of June 1, 1956, effective Jan. 1, 1957; Royal Proclamation Giving Certain Regulations Under the Law Concerning the Obligations to Submit Information as to Conditions of Price and Competition, effective Jan. 1, 1957; and Rules and Regulations for the State Price and Cartel Office, issued by the King, effective Jan. 1, 1957.

¹⁸² Restriction on Competition Law §§ 2-4.

¹⁸³ Obligation to Submit Information Law §§ 1, 3.

¹⁸⁴ Rules and Regulations issued by the King §§ 2-4.

¹⁸⁵ Restriction on Competition Law §§ 1, 5.

¹⁸⁶ Restriction on Competition Law § 21.

¹⁸⁷ Restriction on Competition Law § 6.

¹⁸⁸ Restriction on Competition Law § 23, requires that meetings of the Freedom of Commerce Board be public except where professional secrets are involved or negotiations would be hindered. Obligation to Submit Information Law § 1, calls for the promotion of public knowledge concerning price and competition. Of the Rules and Regulations issued by the King, § 2 obliges the State Price and Cartel Office to promote public knowledge of price and competition, § 5 requires a public information and reporting program, and § 7 calls for the issuance of a publication known as "Price and Cartel Problems."

tries, which operates on the theory that competition is desirable. Apparently, this form of Swedish "control" has been effective. Between 1946 and 1956, under legislation similar to that now in force, 40 per cent of the 1,660 registered agreements were suspended, and of the remainder, 20 per cent were modified by lessening restrictions.¹⁸⁹

The investigative procedure also seems to have been effective. The petroleum cartel investigation was most useful in providing information for a similar study in this country.¹⁹⁰ American interests in Sweden should know that any agreements restricting competition within Sweden will be publicized upon registration.¹⁹¹ Further, they will have to contend with the private decartelization program which may well be more exacting than governmental programs in other countries.

I. France

With but two exceptions¹⁹² the French Government has maintained official silence concerning the work and accomplishments of the Technical Commission for Ententes. The Commission and its Secretariat have accomplished much that is positive in character, and it would seem that much public dissatisfaction with high prices could be avoided if publicity were given to the work of the Commission.¹⁹³ As indicated earlier, the basis for secrecy is an administrative regulation of the Minister of Economic Affairs, which appears to

¹⁸⁹ Irsten, *Voluntary Decartelization in Sweden*, Cartel, Vol. 6, No. 4 (London), Oct. 1956, pp. 116-18.

¹⁹⁰ Actually the Petroleum Investigation was carried on by a parliamentary committee authorized in 1945 and reporting in 1947. See Staff Report of the Federal Trade Commission, Senate Subcommittee on Monopoly, Select Committee on Small Business, 82d Cong., 2d Sess., *The International Petroleum Cartel* 280-311 (Comm. Print 1952).

¹⁹¹ Examples of registrations involving American firms are: Cartel Register, 857, S. S. White Dental Mfg. Co., Philadelphia; 858, Kerr Dental Mfg. Co., Detroit; 859, Ransom and Randolph Co., Toledo; 860, Richmond Dental Mfg. Co., Charlotte; and 866, Ritter Co., Rochester. These American firms and Swedish, German, British, Norwegian, Swiss, and Danish firms, under related numbers, reported a price-fixing and exclusive distribution agreement. Cartel Register, 890-919 reports an agreement between the Swedish subsidiary of United Shoe Machinery and Swedish shoe manufacturers concerning the licensing of shoe machinery equipment. American manufacturers of fiberglass and glass wool will be interested to learn that Cartel Register, 1135 reflects an agreement giving a Swedish enterprise exclusive rights to manufacture such items and the patents necessary. It further ensures against foreign competition. The undertaking is by a Dutch firm whose relationship to American firms is at this time unknown.

¹⁹² The Secretary of State for Economic Affairs, in response to written questions from a member of the Assembly, provided a general statement of the Commission's work and a description of the scope of the legislation in force. He characterized the trend toward competition as beneficial. *Debats Parlementaires, Assemblée Nationale, Journal Officiel*, Oct. 19, and Oct. 26, 1957. M. Rene Jaume, Chief of the Commission's Secretariat, in an unpublished manuscript, *International Conference on Restrictive Business Practices*, Chicago, Jan. 1958, discusses the work of the Commission in one short paragraph after devoting eleven pages to the legal structure and administrative procedures.

¹⁹³ Goldstein, *France's First Discount House*, *Harper's Magazine*, Vol. 213, No. 1279, Dec. 1956, pp. 53-56.

be based on pressure coming from certain sectors of the business community. There is every indication that this pressure is abating, and it is likely that secrecy will shortly be terminated. Thus, American enterprises cannot rely much longer on the lack of publicity.

The work of the Secretariat is carried on by less than a dozen professional civil servants who supervise approximately thirty highly trained investigators from the staff of agents maintained by the Ministry. This small group has been able to provide exhaustive documentation in more than forty instances since the work began upon installation of the Commission on April 9, 1954.¹⁹⁴ Two annual reports to the Minister have issued since then, and the substance of these reports will be considered before approaching the private litigation and other public matters under the legislative system in force.

The first six pages of the first report are devoted to an analysis of the development of the legislation and the role of the Commission and Minister.¹⁹⁵ Two important observations are made by the Commission: (1) that the decree of August 9, 1953, is a logical development arising from earlier legislation and not a towering monument of revolutionary character; and (2) that the legislation is designed to do more than strike down anti-competitive arrangements. It is expected to accomplish a much more difficult task, *viz.*, to educate concerning habitual abuses which are prejudicial to the public welfare and to lead to acceptance of the necessity for rectification.

The Commission devoted the last eight months of 1954, its first eight months of existence, to developing its procedures and techniques and to building up its investigative dossiers. The Secretariat was, of course, continually at work, and the Commission met only on June 7, November 6, and December 18, 1954. The Commission met eight times in 1955.

The 1955 efforts of the Commission involved nine matters in which a recommendation to the Minister or a decisive procedural or jurisdictional decision was made. Six other cases were before the Commission but had not reached a final stage, and fourteen others were in various stages of investigations.

Among the problems which the Commission faced was its competence to investigate and recommend on matters not submitted directly by the Minister but by outside parties. As to such matters, three rules evolved. If the matter were entirely outside the jurisdiction

¹⁹⁴ Much of the material concerning the Secretariat and informed opinion are the result of personal interviews for which no published documentation exists.

¹⁹⁵ Rapport Annual au Ministre Charge des Affaires Economiques (Paris), Dec. 31, 1955, [hereinafter cited as 1st Report].

of the Commission, it would be sent to the proper authorities. In particularly important cases within the scope of the Commission's competence, the matter will be assigned provisionally to a *rapporteur* for preliminary investigation to determine whether the Commission will make a full investigation. In the case of ordinary complaints, they will be referred to the Minister for his decision as to whether or not the Commission should make a full investigation.¹⁹⁶

Because knowledge of the fate of the Commission's recommendation is essential to its work, the Minister has agreed to advise the Commission of the fate of its recommendations.¹⁹⁷

The matter of publicity is a delicate one which the Commission wishes to solve in some fashion which would enlighten the public without naming individuals or corporations.¹⁹⁸ Discussion will be limited to those reported cases in which a recommendation has been made by the Commission and will not mention matters which are still under investigation as of the close of the second report, October 19, 1957.

1. *Reported Cases With a Recommendation by the Commission*

a. *Household Soap Cartel*.—The recommendation in this case was made on April 23, 1955, and subsequently the Minister adopted the recommendation. The cartel was run by a special organization known as la Societe Auxiliaire de la Savonnerie Francaise. The function of this organization was to administer control over soap production by a quota system with penalties for overproduction and indemnities for underproduction, thus controlling the profits enjoyed by the participants. The recommendation called for government assistance in converting the industry to a more competitive form that would permit full exploitation of the potential to produce more and to realize the full potential of the market.¹⁹⁹ In the course of hearing the interested parties, a denial that a cartel existed was entered. This was interpreted by the Commission as foreclosing or estopping the parties from pleading article 59 *ter*, which establishes as a ground for exemption a cartel's beneficial effect on economic progress.²⁰⁰ This is a cartel in which there are American interests, and it is hoped that American stockholders will now benefit from the opportunity given to recognize the full potential of their French affiliates.

¹⁹⁶ 1st Report, pp. 4-5, 7-8.

¹⁹⁷ *Id.* at 13-14. This has been done in only two instances reflected in the reports—soap and yeast.

¹⁹⁸ *Id.* at 24; Rapport Annual au Ministre Charge des Affaires Economiques (Paris), Annee 1956, Oct. 19, 1957, pp. 16-17 [hereinafter cited as 2d Report].

¹⁹⁹ 1st Report, pp. 14, 16-17, 20, 22.

²⁰⁰ 2d Report, p. 11.

b. *Yeast Cartel*.—This cartel is described in footnote 91. The Minister has adopted the Commission's recommendations in this case. In the Commission's study of this cartel, attention was given to the problem of maintaining the industry as an integral part of the French economy. The Commission was impressed with the extent to which the rigid maintenance of commercial positions by the cartel prevented the better placed enterprises from reaching their potential. The fact that those who used yeast had no choice as to price, service, or supplier was particularly condemned. Here again it was recommended that government agencies be utilized to provide both technical and psychological assistance in the transitional period.

c. *Grindstone and Abrasives Cartel*.—The recommendation by the Commission was made on December 17, 1955. Here the cartel was operated by a central organization known as Union Industrielle. Arrangements were based on a price list from which were calculated the minimum prices charged by each factory to each class of purchasers.²⁰¹ The entente argued that it was entitled to an exemption under article 59 *ter* because, by the elimination of price competition, it was possible to concentrate on the establishment of quality competition, thereby encouraging the development of a national industry enhancing economic progress. This argument was not accepted, and the Commission recommended the abandonment of the price practices.²⁰² The industry is one in which there are American interests.

d. *Glass Products for Electrotechnical Use*.—In this industry no written or formal cartel arrangement existed as was true in the first three cases examined. The Commission looked to the facts of the market place and found that two manufacturers dominated the industry, apparently using a common price scale. However, it was demonstrated that the common-pricing arrangement was not used and that the sales conditions of each of the producers had evolved into a clear-cut difference as to price. In the recommendation of November 19, 1955, the Commission absolved the industry of the charges, but it expressly reserved the right to examine the entire glass industry on the basis of facts developed in this investigation.²⁰³

e. *Magnesium Cartel*.—Here the arrangement was through a common sales agency, la Societe Generale du Magnesium. The cartel was

²⁰¹ Id. at 11, 14-16, 19-20, 22. It is interesting to note that No. 847 on the Swedish Cartel Register concerns an agreement to use a 1923 American price list as the basis for calculating current grindstone prices.

²⁰² 1st Report, p. 21. Here also the Commission notes the failure of this and other cartels examined to prove that it opened up new markets which would effectively assist the exportation of French products.

²⁰³ Id. at 15, 23.

based on the monopoly rights derived from patents, which served to exclude those desirous of using processes and materials. The licensing arrangements created obligations to give preferential treatment in the matter of supply and price to licensors and to follow certain limitations on the use and resale of the metal. This investigation brought the Commission for the first time into the conflict between the protection granted by patent laws and the policy of the legislation designed to encourage competition. The Commission indicated that it had no intention of breaking down the patent laws, but it also stated that the domestic and international impact on the economy of the practices brought them within the scope of the legislation. Thus, according to the recommendation of October 8, 1955, patent rights in themselves are not sufficient to provide a defense to the law, particularly where it is found that the elimination of competition between producers also adversely affects the national defense.²⁰⁴ Thus, the French have begun to develop a theory of limited patent monopoly which is not unknown to students of our law, and the factor of national defense is reminiscent of the findings made in this country during the early years of World War II.²⁰⁵

f. *Domestic Water Transport of Coal*.—This matter first came to the Commission by a private complaint,²⁰⁶ was sent to the Minister on December 18, 1954, submitted by the Minister to the Commission on May 24, 1955, and the Commission recommended "absolution" on February 18, 1956. Here the lack of competition was found to result from external causes beyond the control of the entente. Though no specific legislative or administrative act could be found that gave the entente a defense as contemplated in paragraph one of article 59 *ter*, it was found that the price arrangements did result indirectly from governmental controls.²⁰⁷

g. *Metal Drum Production Cartel*.—This cartel was the subject of a recommendation to the Minister on June 27, 1955, and the resultant denunciation of the cartel by the participants was examined by the Commission, which found re-establishment of competition in the industry. The cartel had operated on the basis of a tacit market-sharing agreement. Because of the voluntary abandonment of the practices, the recommendation did not suggest any further action except surveillance of the industry in order to avoid or catch any reappearance of the abandoned practices. In this case the Com-

²⁰⁴ Id. at 16-18, 20.

²⁰⁵ See notes 9, 11 *supra*.

²⁰⁶ 1st Report, p. 12.

²⁰⁷ 2d Report, pp. 2, 11, 14.

mission had an opportunity to study the status of international cartels, a problem which the Common Market will raise, and found that such cartels were under its jurisdiction to the extent that the domestic economy was affected.²⁰⁸

h. *Electric Lamp Manufacturing Cartel*.—This cartel, which has been the subject of a British study²⁰⁹ and an American antitrust case,²¹⁰ was the subject of a recommendation forwarded to the Minister on May 26, 1955. The cartel utilized production quotas with penalties for overproduction and indemnities for underproduction, along with refusals to deal with or to supply those who did not maintain prices. The organism controlling the industry was the *Comite d'Etudes Technico-Commerciales des Lampes Electriques*, whose name would give the impression that it was concerned with research problems. The Commission recognized that recommending the establishment of competitive conditions might, because of the industry's nature, result in concentration. The advantages of efficiency and productivity arising from competition between concentrated enterprises was thought to be more desirable than the previous situation. The Commission recommended a transitional period and did not condemn outright all cartel activities in return for a stipulation that the major practices would be immediately suppressed. It also called for a re-examination of the industry in two years.²¹¹ This is an industry in which there are American interests.

i. *Light Bulb Base Cartel*.—In this investigation the Commission discovered the existence of a cartel different from the one under scrutiny and on May 26, 1956, recommended the initiation of the related investigation. The instant cartel operates on a market quota basis, and it was recommended that, because of the needs of specialization, the cartel be legitimized under article 59 *ter*. It was also recommended that certain activities be organized to encourage normalization in the industry.²¹² This will mean a degree of governmental supervision over the cartel.

j. *Insulated Electric Wire and Cable Cartel*.—This cartel occupied much of the Commission's time before a recommendation was made on January 19, 1957.²¹³ Here again is a cartel which has been scru-

²⁰⁸ Id. at 2, 8-9, 14.

²⁰⁹ The Monopolies and Restrictive Practices Comm'n, Report on the Supply of Electric Lamps, H.M. Stationery Office (London), Oct. 4, 1951.

²¹⁰ *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949).

²¹¹ 2d Report, pp. 2, 9, 11, 14-15.

²¹² Id. at 2, 8, 14.

²¹³ Id. at 1, 3.

tinized in other countries.²¹⁴ The recommendation provides a probationary period of four years, and the Commission must either re-examine the cartel at the end of the period, or it may investigate sooner. Thus, the Commission maintains effective control over the cartel. This industry is one in which there are actually cartels at several levels topped by an international cartel. The producers manufacture other items, further complicating the investigation and recommendation. The central control of the cartels is lodged in the Union Professionnelle des Transports d'Energie Electrique. The Commission found that the cartels utilized every classic form of "legal" and practical control, thus effectively shackling competition. The Commission further found that the cartel existed with the object and effect of preventing the lowering of prices. Against this the Commission found that the cartel had resulted in wise co-ordination of investment, rational use of effort, and improved product quality. Thus, as to mass-produced cables, as distinguished from those produced to special order, the Commission found that the specialization arrangements had benefited the consumer and were legitimate. This did not save the remainder of the ententes, and the Commission noted that much of the improvement in the industry had come as a result of public expenditures and experimentation dealing with the production and transmission of electricity. Thus, the Commission also recommended that the public services which purchase wire and cable undertake to place their orders in a co-ordinated fashion and improve relations with the producers, as a means toward obviating the re-establishment of the cartel in its original form.²¹⁵

2. *Further Developments and Observations*

During the period January 1, 1956, to January 31, 1957, covered in the second report, the Commission, in addition to the actions terminating in recommendations, received one matter from the Minister which he subsequently called back.²¹⁶ Three other cases were considered by the Commission but had not resulted in a recommendation. In seven cases the investigative work had been completed, and in thirteen cases investigations were still in progress. The statistics reflect a remarkable amount of work by the small and painstaking staff.

²¹⁴ E.g., Monopolies and Restrictive Practices Comm'n, Report on the Supply of Insulated Electric Wires and Cables, H.M. Stationery Office (London), June 10, 1952, pp. 50-54. See also U.N. EcoSoc Council Off. Rec. 19th Sess., Supp. No. 3A, at 8-10 (E/2675) (1955).

²¹⁵ 2d Report, pp. 6, 9-14.

²¹⁶ Id. at 2-4.

Certain general observations made in the first report are worthy of note. The Commission has found that many investigated cartels are in reality small subdivisions of larger cartels; therefore, the Commission would like to investigate the basic cartels and subsequently the general related cartels. The investigations under way reflect this request. The Commission also feels it would be aided by better liaison with other government agencies that may be interested in a certain sector of commerce or industry.²¹⁷ As already indicated, the first report closes with a plea to the Minister to change his regulations concerning secrecy. Even though in theory *stare decisis* does not apply, the Commission recognizes that knowledge of banned practices will lead other cartels to the abandonment of similar practices.²¹⁸

In the second report the Commission notes that there has been a breakdown of cartel control over certain industries. The Commission does not accept this fact as a defense because the cartel mechanism could be reactivated. In each recommendation the Commission has tried to make practical and constructive suggestions that will fit the particular problems of the industry being studied. There is every reason to believe that the attempt has succeeded. The Commission concludes the report with several requests. It restates its request for information on the ministerial disposition of its recommendations so that it will not be operating in a vacuum. Further, it devotes almost two pages to a renewed plea for publicity and an end to secrecy by ministerial fiat. Not only reasons for this position, but also concrete suggestions as to the form of publication are advanced. These include a censored version of a report which would meet the objection of those who do not wish to have specific industries identified.²¹⁹

Despite the veil of secrecy, there appears to be an increasingly large and influential body of French public opinion that fully supports and respects the work of the Commission. It is inevitable that the veil will soon be lifted. This means that not only may any arrangement involving American interests (including patent agreements) be subject to investigation by the Commission, but also that the light of publicity will be applied in France as elsewhere.

The exemptions that have been granted from the ban on resale price maintenance have been few,²²⁰ and the most significant has

²¹⁷ 1st Report, p. 23.

²¹⁸ *Id.* at 24.

²¹⁹ 2d Report, pp. 9-10, 13, 16-18.

²²⁰ Bulletin Officiel des Services des Prix, 14eme Annee, No. 21 (Paris), Sept. 17, 1954, p. 149, textile, Migaline; *id.* at 149, dressing glove; *id.* at 148, textile, Zephyr-Bob; *id.*

been that given to perfumes²²¹ on the ground that resale price maintenance in the American market depends on fixed prices in France. A recent decision raising the question of the validity of present arrangements for perfume importation into this country,²²² and our trend away from resale price maintenance may change this picture.

The August 9, 1953, decree has led to private litigation based on an allegation that a refusal to sell is founded on a dealer's unwillingness to abide by price "suggestions" of the supplier. The most publicized case involves as defendant, Thomas-Houston, the largest appliance maker in France, and Studios Wagram, the first French discount house.²²³ The complaint was filed on August 1, 1955,²²⁴ and on February 25, 1958, the case was postponed until April 29, 1958, at which time it was expected that argument would be set for June 10, 1958.²²⁵ In the meantime, other suppliers of the plaintiff suddenly cut off the goods contracted for December 1957, thus bankrupting the discount house which had orders and overhead for 100 million francs (\$250,000) worth of goods.²²⁶

Other cases have been handled more speedily. In a case brought by an optician on the grounds of refusal to sell, the manager of a major manufacturer of eyeglass frames was given a suspended sentence of six months imprisonment. A fine of two million francs (\$5,000) was imposed, and damages of 800,000 francs (\$2,000) were awarded the plaintiff.²²⁷

A central buying agency, representing 375 dealers, sued a hair dressing preparation firm which defended on the ground that the dealers were not skilled in using the preparation. This was rebutted by a showing that grocery stores, department stores, and five and ten cent stores were supplied the product as long as they main-

at 148, textile, Lavablain; id., 15eme Annee, No. 19 (Paris), June 22, 1955, at 111, Frigidaire refrigerators; id., 16eme Annee, No. 7 (Paris), April 14, 1956, at 74, Arthur Martin Stoves; id. at 74, house slippers, Dr. Jeva. Note that automobiles are price fixed without authorization. See also notes 84 and 85 *supra*.

²²¹ Bulletin Officiel des Services des Prix, 14eme Annee, No. 21 (Paris), Sept. 17, 1954, pp. 148-49. Here are listed fifty-three perfume houses and eleven cosmetic manufacturers whose products are exempt from the ban on fixed prices.

²²² United States v. Guerlain, Inc., 155 F. Supp. 77 (S.D.N.Y. 1957).

²²³ See note 193 *supra*.

²²⁴ See article entitled "La Guerre des Prix Imposes Est Declaree," Les Informations Industrielles et Commerciales (Paris), April 13, 1956.

²²⁵ See article entitled "Nouveau Renvoi de l'Affaire 20%," Les Echos (Paris), Feb. 26, 1958.

²²⁶ Letter from the Discount House to the Productivity Commissariat of the French Government, Feb. 20, 1958. The letter indicates that goods were ordered under six and twelve month contracts prior to December 1957, and that the contracts were not honored. The discount house gross in 1955 was \$715,000, and in 1957 it was \$2,000,000.

²²⁷ See article entitled "Les Ventes au Detail avec Rabais," Les Echos (Paris), Feb. 25, 1958.

tained the price. The fine in this case was 100,000 francs (\$250) and the damages received by the plaintiff were 600,000 francs (\$1,500).²²⁸

These cases indicate that refusal to sell will become increasingly dangerous if the legal system is not perverted to destroy plaintiffs by delay.

VI. CONCLUSION

There can be no doubt that the free world has come to realize that capitalism, or some modified form of it, cannot resist the onslaught of Communism unless it ensures a responsible attitude toward competition. There is growing recognition of the fact that private restraints on business are, and can be, as harsh as those imposed by a Commissar. The consumer wonders whether the Communist system may not be superior to the extent that it makes a pretense of public control over industry.

The need for control over restrictive practices and the public demand for such controls have been recognized in many legislative enactments during the past twelve years. In some instances, legislation has been modified after only a few years of experience disclosed that the controls were not adequate. This trend continues, and one can reasonably expect more controls which in practice will reach the norms established after many years of experience under our antitrust laws. Already one can see that in some ways foreign legislation is even more strict than ours, and in some cases the amount of governmental control over business far exceeds the most violent nightmare of the American businessman. The possibility for firm regional controls exists in the Common Market, dependent only upon the will of the administrators and the politicians of the member states.

The increased use of publicity cannot be discounted. There is already evidence that at least one international organization, the European Productivity Agency, contemplates the creation of an international documentation service dealing with restrictive business practices. Full interchange of public information will avoid much duplication of effort in investigation and afford profitable leads for other investigations. There is no doubt that publicity and the possibility of governmental interference with daily business activities,

²²⁸ See article entitled "Dans Quels Cas Peut-On Justifier un Refus de Vente?," *Les Echos* (Paris), March 3, 1958.

profits and dividends will serve to discourage many enterprises from engaging in restrictive business practices.

It has been the good fortune of the writer to work with most of those responsible for the development and administration of European restrictive business practices controls. The group includes top-notch lawyers, economists, and administrators, all of whom are able and affable. If one needs to deal with any of them, he will find them scrupulously fair and forthright. They are men of broad practical experience dedicated to the idea that free enterprise must survive. They are men of vision who do not lose sight of reality. In their hands the future of free enterprise is safe, and Americans operating abroad will benefit from their advice and counsel.